UPREME COURT, U. S.

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No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
COMMON CARRIER CONFERENCE-IRREGULAR ROUTE
REGULAR COMMON CARRIER CONFERENCE,
Appellants,

v.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellants, National Motor Freight Traffic Association, Inc., Common Carrier Conference-Irregular Route, and Regular Common Carrier Conference appeal from a judgment of the United States District Court for the District of Columbia which dismissed appellants' complaint challenging the lawfulness of an order of the Interstate Commerce Commission. Appellants submit this statement to

show this Court has jurisdiction of the appeal and that substantial questions warranting plenary review are presented.

OPINIONS BELOW

The *per curiam* opinion of the District Court in *National Freight Traffic Association, Inc., et al.* v. *United States, et al.* is unreported. The opinion and the court's judgment appear in the Appendix hereto at pages 4a and 6a, respectively. The order of the Interstate Commerce Commission, together with the recommended report and order of the hearing examiner which it adopts, is reported at 105 M.C.C. 199 (1966), and appears at page 8a et seq. of the Appendix hereto.

JURISDICTION

This action was brought by appellants pursuant to the provisions of 28 U.S.C. §§ 1336, 2284 and 2321-2325 to enjoin, annul and set aside an order of the Interstate Commerce Commission dismissing a complaint in Docket No. MC-C-3192 (Sub No. 33), *National Motor Freight Traffic Association, Inc., et al.* v. *Pacific Progress Shippers Association, Inc., et al.*, 105 M.C.C. 199 (1966). The judgment of the district court dismissing appellants' suit with prejudice was entered March 19, 1968. Notice of Appeal was filed by appellants in the district court on May 17, 1968. This Court has jurisdiction under 28 U.S.C. §§ 1253 and 2101(b) to review the judgment of the district court on direct appeal. *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 372 U.S. 744 (1963); *A. L. Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964)

STATUTES INVOLVED

The pertinent statutory provisions are Sections 402(a)(5), 402(a)(7), 402(c)(1), and 410(a) of the Interstate Commerce Act, 49 U.S.C. §§ 1002(a)(5), 1002(a)(7),

1002(c)(1), 1010(a), and Sections 557 and 706 of the Administrative Procedure Act, 5 U.S.C. §§ 557, 706, which provisions are set forth in the Appendix hereto at page 1a et seq.

QUESTIONS PRESENTED

1. May the Interstate Commerce Commission exempt an association of shippers from regulation under Part IV of the Interstate Commerce Act pursuant to Section 402 (c) thereof on the basis of a determination that the shipper members bear the financial risk and burdens of the association, where the Commission made no findings of fact to support this conclusion, and where the record established that the association is incorporated; that its members are protected from all liability for the operating expenses and debts of the association by its corporate charter and by-laws; and that the only obligation a member undertakes is to pay the association's freight charges for transportation performed at his request?

2. Is the Commission's decision contrary to this court's decisions in *United States* v. *Pacific Coast Wholesalers' Association*, 338 U.S. 689 (1950) and *United States* v. *Drum*, 368 U.S. 370 (1962)?

3. On appeal from an order of the Interstate Commerce Commission grounded on the absence of a statement of findings and conclusions or reasons or bases to support the Commission's determination of a material issue of fact and law involving the construction of Section 402(c) of the Interstate Commerce Act, may the district court dismiss the appeal under the Administrative Procedure Act without deciding the relevant questions of law and statutory interpretation raised therein on the ground that ". . . the answer to the problem is more easily reached by direct consideration of the terms of the statute itself."?

STATEMENT

Appellants are three national organizations of common carriers of property by motor vehicle operating in interstate commerce under certificates of public convenience and necessity issued by the Interstate Commerce Commission. Their combined memberships comprise virtually all of the nation's regulated motor carriers which perform interstate transportation of general commodities throughout the continental United States. Each organization is charged under its charter and by-laws with the duty of protecting the interests of its members and each from time to time institutes and participates in administrative and judicial proceedings concerning the lawfulness of the operating practices of persons engaged in performing transportation or in rendering transportation services in competition with its members. Pursuant to Section 5a of the Interstate Commerce Act, 49 U.S.C. § 5b, appellant National Motor Freight Traffic Association, Inc. is the agency by which some 4,000 of its member carriers collectively discharge their duty under Section 216 of that Act, 49 U.S.C. § 316, to establish and maintain lawful classifications of property and lawful rules, regulations and practices governing the transportation they perform. In *National Motor Freight Traffic Association* v. *United States*, 372 U.S. 246, 247 (1963) the Court held that this appellant performs "significant functions in the administration of the Interstate Commerce Act," and has standing to represent its members in judicial proceedings in which the validity of the actions of administrative agencies is at issue.

On September 11, 1963, appellants filed a complaint with the Commission alleging that Pacific Progress Shippers Association, Inc. (Pacific or the Association), its members, and certain other designated persons were engaged in the business of freight forwarding, as that term is defined in Section 402(a)(5) of Part IV of the Interstate Commerce Act, 49 U.S.C. § 1002(a)(5), without a

permit from the Commission in violation of Section 410 (a) of the Act, 49 U.S.C. § 1010(a). A hearing on the complaint was held before a Commission examiner at which the following facts were developed.

Pacific is chartered under the law of the State of Washington as a non-profit membership corporation for the purpose of procuring the "pooling, consolidating, transportation and distribution of freight . . . . ." (Record: Exh. 5). In the performance of its corporate function, the modus operandi of Pacific's operations does not differ in any material respect from that of a freight forwarder as described in Section 402(a) of the Act. A receiver of freight in Seattle who has become a member of Pacific, may procure the transportation of a shipment to it from Philadelphia in the service of Pacific by simply instructing its supplier to tender its shipment to a common carrier by motor previously designated by Pacific and consigned to Pacific in care of an eastern consolidation agent previously designated by Pacific (Record: Exh. 4, p. 31; Exh. 34, pp. 4-5). At the terminal of the consolidating agent, the shipment is consolidated with the shipments of other users of Pacific's service, and tendered as part of a consolidated shipment to a railroad for transportation to Seattle. The consolidated rail shipment moves on a uniform straight bill of lading naming Pacific, or its consolidating agent, as consignor, and Pacific, or its distribution agent in Seattle, as consignee. When the consolidated rail shipment arrives at Seattle, the individual shipments of Pacific's members are separated by Pacific's distribution agent and transported to the members' places of business. For this service, Pacific bills each member a charge based on a single factor rate in cents per hundred pounds, which rate includes "all charges from point of origin to destination" (Record: Exhs. 1, 25, 26, 33). *Vis a vis* its members, Pacific assumes responsibility from the point of origin to destination for loss or damage to shipments, and its single factor rate is designed to cover the cost of insurance the Association maintains to protect

itself (Record: Exh. 31). To "give the member far greater protection than he is now receiving", i.e., that protection being received from a regulated freight forwarder, Pacific includes the cost of insurance in the rates it charges its members (Record: Exhs. 1, 48).

Besides providing all of the physical services of a freight forwarder, the record establishes that *vis a vis* its members, Pacific assumes all of the risks and burdens of providing the transportation service. Under the law of Washington, Pacific's members cannot be held liable for any of the Association's debts. Rev. Code, Wash. Title 24, Sec. 24.04.080. See also *Meiple* v. *Wenatchee North Central Freight Distributors*, 129 Wash. 619, 225 Pac. 819 (1924); Wash. Constitution, Art. XII, Sec. 4. Supplementing this immunization of the members against liability, Pacific's By-Laws provide that the only obligations of a member, other than to pay the charges on shipments moved for his account as provided in Article XI, are to pay, first, an initial membership fee (Article II), and, second, special assessments "to pay expenses incurred in establishing new operations or in performing unusual services," but only if he has agreed "in advance to participate in such new operations or to share the cost of performance of the unusual services," (Record: Exh. 6, Article II, Article XII). While the By-Laws require each member to advance $100.00 as working capital, Article XIV gives each member the right to the refund of this payment upon termination of membership (Record: Exh. 6, Article XIV). The By-Laws also purport to require members to post bond to guarantee freight charges on their own individual shipments (Record: Exh. 6, Article XV). The record establishes, however, that this requirement is largely disregarded and unenforced (Record: Tr. 226, 309, 325, 407, 496-97; see also Examiner's Report, 105 M.C.C. at pp. 214, 216, 218, 219, 231).

Several representatives of members of Pacific appeared as witnesses and testified to the effect that they and their

companies did not assume the financial risks of Pacific, and that their only liability growing out of their membership was to pay Pacific their own individual freight charges (Record: Tr. 176, 197, 230, 257, 325-326, 408, 496, 817; see also Examiner's Report, 105 M.C.C. at pp. 214, 215, 218, 219, 226, 231). The financial risk of Pacific's members being limited to the payment of their own freight charges assessed by the Association, the members thus bear no responsibility for the risk that the charges they pay for the transportation they receive will fall short of meeting the sum of Pacific's payments to the carriers whom it employs and its expenditures for other operating expenses. For that matter, the record is clear that no individual member bears the risk of this loss in the transportation of his own shipments. Pacific's members are quoted a firm rate before their shipments move, and the rate so quoted is the measure of their maximum obligation to Pacific (Record: Tr. 24-25, 284, 353, 559). For example, Pacific quotes rates showing "Association Fixed Costs Per One Hundred Pounds" from New York, Philadelphia, Chicago and Charlotte to Spokane, Seattle, Tacoma and Portland, Oregon (Record: Exh. 31). In some instances Pacific deliberately fixes its rates below costs. Thus, Pacific sent a "cost comparison sheet and routing guide" to the Ken Bush Company, a member in Spokane, Washington, and, in an accompanying letter, notes that some of Pacific's costs shown are higher than Ken Bush's costs via regulated freight forwarder. Nevertheless, the letter states that Ken Bush "will be protected on the present level of rates. In other words, at no time will the association costs from these services exceed rates via regulated forwarders." The Board of Directors of Pacific specifically approved this arrangement (Record: Exh. 45).

Pacific's auditors' report for the year 1963 shows accumulated losses from the beginning of its operation of $14,722.40 (Record: Exh. 56, Exh. A). As of December 31, 1963, Pacific owed its creditors $44,087.95 (Id). The

auditors used the monies in Pacific's "membership fund", i.e., the $100.00 initial fees of the members, to offset the Association's operating losses. The effect of this offset was to reduce the initial fees of 131 members in the total amount of $13,100.00 to a sum of only $2,105.03 as of December 31, 1963 (Record: Exh. 46, Exhibit a; Exh. 56, Exhibits A and C). As of December 31, 1964, there remained only $1,304.97 in this membership account, reflecting charges against the fund for travel, meetings of trustees, advertising and "servicing expense." (Record: Exh. 48, Exhibit C). As far as the record shows, this latter amount is all that remained of the so-called "paid in capital" of the membership available to offset the substantial liabilities and operating deficits of the Association.

On these facts, appellants argued before the Examiner that the Association's members did not bear any financial risk in connection with the service being performed on their behalf by Pacific; that the members did not, as principals or otherwise, assume the essential risks and transportation burdens entailed in conducting Pacific's operations; and that the members of Pacific were therefore not engaging in the consolidation and distribution of freight by and for themselves, or through Pacific as their agent, within the meaning of the exemptive provision of Section 402(c)(1) of the Act, but were, in fact, purchasing for-hire transportation of the type which the Commission and the courts have held to be subject to regulation under the Act.

In his recommended report and order dated December 29, 1965, the Examiner recognized the necessity of ruling on these contentions, stating, 105 M.C.C. at p. 241:

> "While Part IV of the act provides for the economic regulation of freight forwarders, it also recognizes the right of all shippers, or their group, to combine their goods ,on a nonprofit basis, for the purpose of obtaining the transportation savings flowing from

> their collective ability to utilize volume rates. At the same time the statute precludes a shippers' association from purchasing, 'for compensation' a complete transportation service in which the details, risks, and responsibilities of freight assembly, consolidation, forwarding, break-bulk, and distribution are assumed for it by a person not licensed by the Commission."

The Examiner stated the statutory standard as follows, 105 M.C.C. at p. 241:

> "Where shipper-members themselves, to the exclusion of all others, control, direct, and dominate the freight consolidation and distribution services and assume all the risks and burdens, such operations are of the character specifically safeguarded by Section 402(c) (1)."

Again, quoting from the decision of the Commission in *Atlanta Shippers Association, Inc., Atlanta, Georgia—Investigation of Operations*, 322 I.C.C. 273 at 283, the Examiner stated the "appropriate test", in determining whether the shipper-members of the Association are purchasing a complete freight forwarder service, to be, 105 M.C.C. at pp. 241-242:

> "Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration?"

The Examiner held that this statutory test had been met, stating, as his ultimate finding of fact, that ". . . the members [of Pacific] and their elected trustees assume the essential risks and burdens of the Association as well as control, direct and dominate its operations." On the basis of this single finding, the Examiner concluded that the evidence failed "to establish that the operations conducted by the defendants are not exempt from regula-

tion by the Commission under Section 402(c)(1) and (2) of the Act," and recommended the complaint be dismissed. 105 M.C.C. at p. 246. The Examiner made no subsidiary findings of fact to support his ultimate finding of fact and conclusion, his treatment of the record being limited to a recitation of the evidence presented by the parties.

Appellants filed exceptions to the recommended report and order. In a one page order dated June 20, 1966, the Commission, Division 1, adopted the Examiner's Report without opinion, stating, with one exception not here pertinent, "that the statement of facts, the findings, and the conclusions of the Examiner . . . being proper and correct in all material respects, should be, and they are hereby affirmed and adopted as our own." 105 M.C.C. at p. 200.

On October 4, 1966 appellants filed suit in the United States District Court for the District of Columbia to enjoin, vacate and set aside the Commission's order. Appellants grounded their action on the contentions, *inter alia*, that the Commission had violated the Administrative Procedure Act by failing to make the essential findings of fact and conclusion and state the reasons and bases therefor upon the material issues of fact and law presented on the record, and that its determination that Pacific's members assumed the essential financial risks and burdens of the Association was contrary to the evidence, contrary to the statutory standard it purported to apply, and inconsistent with Commission and judicial precedent. The case was heard before a statutory three judge court, composed of Prettyman and Miller, Senior Circuit Judges, and McGarraghy, District Judge, which on December 6, 1967 issued its per curiam decision dismissing the complaint. After reciting the language of Section 402(c)(1) of the Act, the Court held, *in toto*, as follows (Appendix, p. 5a):

> 'The findings clearly show these terms to be descriptive of the organization and operation of the Association here involved. The evidence in the record

amply supports these findings. The examiner and the Commission so concluded. We agree.

"Much discussion is devoted by counsel for all parties, and by the Commission itself, to the meaning of various interpretive pronouncements of the Commission upon this subject. We think the answer to the problem is more easily reached by direct consideration of the terms of the statute itself. The complaint will be

Dismissed."

THE QUESTIONS ARE SUBSTANTIAL

This appeal brings questions of first impression to this Court as to the authority of the Commission under Section 402(c) of the Interstate Commerce Act to exempt from regulation under Part IV thereof groups of shippers claiming to be operating as shippers' associations in the consolidation and distribution of freight for themselves and their members.

The Commission for the first time has here applied Section 402(c) to permit a group of shippers, organized as an incorporated association, to conduct an exempt freight forwarder service in which no shipper member incurs any risk or bears any financial responsibility for the acts and debts of the corporation in performing the transportation business on his behalf. The Commission did so without stating any findings, conclusions or reasons to justify this result under the statute, on the basis of an unsupported determination that the members met the statutory test for exemption because they assumed the essential financial risks and burdens of the association. The decision hopelessly confuses, if it does not obliterate, the distinction heretofore existing between group activities of shippers in providing their own transportation and the operations of regulated forwarders conducting for-hire transportation, and gives strong impetus to further growth in the number, size of memberships and operating scope of exempt

forwarding operations which have already succeeded, in recent years, in diverting substantial traffic and revenues from common carriers serving the general public. Not only does the Commission's action have no rational factual or legal basis, it serves to defeat one of the vital objectives of economic regulation which Congress intended under the Act. The direct consequence of the decision is to considerably worsen the economic plight of regulated carriers for whom the Commission is bound under the National Transportation Policy to "foster sound economic conditions in transportation and among the several carriers." 49 U.S.C. preceding §§ 1, 301, 901, 1001.

Undoubtedly, the most important and most vexing problem which the Commission has faced in its administration of the Interstate Commerce Act in the past ten years is the so-called "gray area" of transportation, i.e., unauthorized transportation conducted under the guise of legitimate private carriage pursuant to a claim of exemption under one of the exclusionary provisions of the Act. Recognizing that reasonable restraints on unregulated transportation are important to the continued welfare of a regulated national transportation system, and that information was almost totally lacking as to the nature and extent of unregulated operations, the Chairman of the Senate Committee on Interstate and Foreign Commerce in the latter part of 1959 directed the Commission to analyze and assemble available information on gray area transportation. The results of this study were published in Commission Statement No. 6010, *Gray Area of Transportation Operations*, which was completed and submitted to the Committee in June, 1960.

Among the many and varied types of unregulated operations discussed in the study, the Commission advised the Committee that a gray area existed in transportation by associations operating under the claim of the Section 402(c) exemption (Statement No. 6010, p. 102). The Commission was unable to inform the Committee as to the

volume of traffic handled by this or other gray area operations, stating that no statistics are available to measure the volume of tonnage being diverted from authorized carriers (Statement No. 6010, p. 108).[1] However, in summarizing the effects of gray area operations, the Commission told the Committee, *inter alia*, that a "large part" of the traffic of shippers' associations and other unauthorized operations is a direct diversion from regulated carriers; that such diversion affected the balance and efficiency of common carrier operations and resulted in significant losses of revenue and higher ratios of expense to such revenues; and seriously impaired the operations of specialized commodity carriers and carriers serving small towns and remote points. Speaking of the "long run interest of shippers and the general public interest in transportation," the Commission warned that "the continued development of gray area transportation could be detrimental in terms of fewer authorized carriers available, less frequent schedules, reductions in scheduled carrier equipment—in general, a decline in the quantity and/or quality of regulated for-hire transportation." Moreover, the Commission specifically pointed out that "among the factors which could encourage the further development of gray area transportation" were "the formation of unlawful shipper cooperatives . . . which directly promote gray

[1] The Commission stated:

> "One of the functions of a transport regulatory body is compilation of data on carriage subject to regulation. Information on unauthorized transportation, however, is obtained only by special research, or in connection with proceedings before the regulatory body involving such transportation. Statistics of unlawful operations investigated by the Commission and other regulatory agencies could not be made available on a uniform basis in any event because of the differing nature of data required in individual proceedings.
>
> "'Thus, the inherent nature of the gray area precludes obtaining complete or fully reliable data for operations falling within this area; and intensive analysis of the problem is hindered by the lack of an adequate statistical foundation." (Statement No. 6010, pp. 2-3).

area operations," and "the need felt by shippers to use such transportation to reduce costs and remain competitive with other gray area users." (Statement No. 6010, pp. 108-109).

The Commission's fear that gray area operations would snowball to the increasing detriment of regulated transportation has been borne out in the intervening eight years. In 1960 the Commission estimated the number of organizations operating without authority under claim of the Section 402(c) exemption to be approximately 135. (Statement No. 6010, p. 105).[2] In November 1967, the Commission released Statement No. 67-2, *The Role of Regulated Motor Carriers in the Handling of Small Shipments*, in which its Bureau of Economics pointed to the "increasing number of such associations now estimated as over 300 . . . ," and stated that more shippers "are resorting to the practice of performing their own transportation service" with the result that private carriage "both legal and illegal, today poses probably the greatest single existing threat to the future welfare of the general commodity motor common carrier." (Statement No. 67-2, pp. 95, 104).

Concurrently with the release of Statement No. 67-2 the Commission on November 30, 1967, issued a document entitled *Small Shipments Problem, Report of the Ad Hoc Committee of the Interstate Commerce Commission*, composed of Commissioners Murphy, Walrath, and Brown. This Report, which was made at the direction of the Commission's Chairman, characterized the so-called small shipments problem as "a misnomer" because an "analysis of complaints revealed that regardless of weight, volume, or configuration of shipments, service difficulties existed," and that while such problems "cut across modal lines, . . .

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[2] The Commission stated: "A question exists whether certain of these associations are conducting unlawful operations as freight forwarders. It is not known what percentage of total operations of the freight forwarding type are conducted under exemption." (Statement No. 6010, p. 106).

the most crucial area related to the motor carrier industry." (Ad Hoc Report, p. 1). Discussing the causes and possible solutions for this problem the Ad Hoc Committee noted that "one of the most frequent complaints of regular route carriers of general freight is that, while only they have an obligation to provide consistently scheduled service to all shippers, carriers engaged in unlawful operations, and many other carriers—exempt, contract and irregular route—are too readily allowed to transport the most attractive traffic thereby reducing the ability of regular route carriers to maintain quality service for all shippers." Conceding the merits of this contention, the Ad Hoc Committee stated that the Commission appears to have accepted its partial validity "by seeking now to enforce greater observance of the act . . . [and] . . . by recommending partial repeal of certain exemptions . . . ." (Ad Hoc Report, p. 8).

Appellants, and their members, share the Commission's desire to maintain a viable common carrier system capable of serving the entire shipping public. Whether they be big or small, remotely located or concentrated in large urban centers, shippers and receivers of freight have a right to expect satisfactory service at reasonable rates. This expectation cannot be realized in the face of unduly broad interpretations of the Act which, as here, encourage the unrestrained growth of unregulated competition which the Commission itself recognizes seriously threatens the ability of motor carriers to render such service. While the Commission claims that it is seeking to enforce greater observance of the Act and to narrow the exemptions permitting unregulated transportation, its decision here accomplishes precisely the opposite result.

I

In *United States* v. *Drum*, 368 U.S. 370 (1962), this Court was recently confronted with the question whether particular transportation was "for-hire" carriage subject to economic regulation under the Interstate Commerce

Act, or was, in fact, transportation by a shipper of his own goods exempt from regulation. Enunciating at the outset, the principles which must govern this determination, Mr. Justice Brennan, writing for the majority, stated, 368 U.S. at 374-376:

> "From the beginning underlying principles have been, and have remained, clear. A primary objective of the scheme of economic regulation is to assure that shippers generally will be provided a healthy system of motor carriage to which they may resort to get their goods to market. This is the goal not only of Commission surveillance of licensed motor carriers as to rates and services, but also of the requirement that the persons from whom shippers would purchase a transportation service designed to meet the shippers' distinctive needs must first secure Commission approval. See Contracts of Contract Carriers, 1 M.C.C. 628, 629; Keystone Transportation Co., 19 M.C.C. 475, 490-492. The statutory requirement that a certificate or permit be issued before any new for-hire carriage may be undertaken bespeaks congressional concern over diversions of traffic which may harm existing carriers upon whom the bulk of shippers must depend for access to market. Accordingly, the statutory definitions, while confirming that a shipper is free to transport his own goods without utilizing a regulated instrumentality, at the same time deny him the use of 'for compensation' or 'for-hire' transportation purchased from a person not licensed by the Interstate Commerce Commission. Because the definitions must, if they are to serve their purpose, impose practical limitations upon unregulated competition in a regulated industry, they are to be interpreted in a manner which transcends the merely formal. From the outset the Commission has correctly interpreted them as importing that a purported private carrier who hires the instrumentalities of transportation from another must—if he is not to utilize a licensed carrier—assume in significant measure the characteristic burdens of the transportation business. The problem is one of determining—by

reference to the clear but broad remedial purpose of a regulatory statute committed to agency administration—the applicability to a narrow fact situation of imprecise definitional language which delineates the coverage of the measure." (Footnote omitted).

What are "the characteristic burdens of the transportation business" which the Court in *Drum* said a shipper must bear in order to perform the unlicensed transportation of his own goods? There, a shipper, Oklahoma Furniture Manufacturing Company, claimed that the transportation of its goods in equipment leased from and operated by so-called owner-operators having no certificates from the Commission, was private carriage exempt from regulation under Part II of the Act by Section 203(a), 49 U.S.C. § 303(a). Under the leasing arrangements, which were for renewable terms of one year, the shipper was granted the sole right to control the use of the tractors through the owner-operators employed by it. Oklahoma paid for its use of the tractors on a mileage basis, with the operating costs, including gasoline, oil, grease, parts and registration fees, being paid by the owner-operators. No responsibility for wear and tear or damage to the tractors was assumed by Oklahoma, nor did it provide collision or fire and theft insurance coverage. Oklahoma paid for public liability and property damage insurance on each vehicle, and the owner-operators assumed no responsibility to Oklahoma for damage to cargo. While the owner-operators were required to pay for repairs to equipment, Oklahoma conducted safety inspections, and assumed other responsibilities such as administering physical examinations to the drivers, supervising the preparation of reports required by the Commission, paid social security taxes and withheld income taxes, and provided workmen's compensation, 368 U.S. at 378, 379.

On these facts the Commission held that the transportation was for-hire rather than private, grounding its determination on two findings: first, that persons other than the shipper had the right to control, direct, and

dominate the transportation; and, second, that persons other than the shipper were, in substance, engaged in the business of transportation of property for-hire. 79 M.C.C. at 409-410; 368 U.S. at 381. On appeal the District Court for the Western District of Oklahoma reversed, basing its decision solely on its disagreement with the Commission's first finding as to shipper control. *Drum* v. *United States*, 193 F. Supp. 275 (1960). On appeal to the Supreme Court, the Commission did not challenge the district court's conclusion on the control issue, 368 U.S. at 381, but instead attacked the court's failure to pass on the correctness of the Commission's second finding, contending that affirmance of the Commission's decision on this point required affirmance of its order. Agreeing with the Commission, this Court reversed the district court. Holding that "a finding of shipper control does not require a resolution of the ultimate issue in the shipper's favor," the Court stated that while the Commission's "initial technique" assessed the shipper's assumption of the burdens of transportation in terms of the degree to which he undertook to "control" or "dominate" it, throughout its reports the Commission has taken note of "various factors which clearly transcend any narrow concept of physical direction of the details of the operation," and that "it has always been apparent that the vesting of such physical 'control' in the shipper would not in itself suffice to render the transportation private carriage." 368 U.S. at 382, 383.

Stating the question to be whether the shipper "had so far emancipated itself from the burdens of transportation that to permit it, on such terms, to secure a transportation service from these unlicensed owner-operators would be inconsistent with the statutory scheme," the Court held that, while the shipper's modus operandi possessed many of the hallmarks of bona fide private transportation,

> "Still, the Company was able to spare itself—and pass to the owner-operators—certain characteristic burdens of the transportation business. The large

> capital investment in the tractors and the risk of their premature depreciation or catastrophic loss, was borne by the owner-operators, not by the Company. The owner-operators, rather than Oklahoma, stood the risk of a rise in variable costs such as fuel, repairs and maintenance of the tractors in good operating condition, and living expenses, although the thirty-day cancellation privilege, taken together with the possible bargaining power of the owner-operators *en bloc*, may have affected the degree to which that burden was actually shifted. Finally, Oklahoma was able to divest itself, to a significant extent, of the risk of non-utilization of high-priced equipment. The owner-operators received neither rental payments nor wages when their tractors were not used and they did not drive. Oklahoma did, however, carry the risk of a nonproductive backhaul." 368 U.S. at 379.

The *Drum* case thus makes clear that in order for shippers to perform their own transportation free of regulation, they must assume all of the essential risks and major burdens inherent in the particular transportation operation. The shippers, and not someone else, must assume the risk of investment in equipment and other assets necessary to carry on the transportation; the shippers and not someone else, must bear the risk of operating deficits occasioned by fluctuations in the variable costs of operation; and the shippers, and not someone else must bear the ultimate risk that the transportation venture may be unprofitable and fail.

Within a few months after this Court decision in *Drum*, the Commission held its rationale to be equally applicable in determining the bona fides of a group or association of shippers providing transportation of their own goods under Section 402(c)(1) of the Act. In *Atlanta Shippers Association, Inc.—Investigation of Operations*, 316 I.C.C. 259 (1962), the Commission was presented for the first time with the primary problem of determining the essential line of demarcation between the nonregulated con-

solidating and distributing activities of a group or association of shippers and those of a freight forwarding operation subject to the licensing provisions of Part IV of the Act. Pointing to a recent and substantial increase in the number of shipper associations operating under the claim of exemption, and the considerable difficulty encountered in distinguishing between their services and those of regulated forwarders, 316 I.C.C. at 259, the Commission, Division 1, stated, 316 I.C.C. at 279:

> ". . . general considerations must be accorded practical application; and, of necessity, unregulated competition in any regulated industry must be confined within certain practicable limitations which are to be determined by the substance and not by lable. *United States* v. *Drum*, 368 U.S. 370 (1962). Admittedly, the line of demarcation between these two general types of service—regulated and unregulated —may not always be clear, and in these instances there arises the problem of determining the applicability of the governing standards to the facts in each case. Not all persons calling themselves shippers' associations or agents are entitled to the benefit of the statutory exclusion of section 402(c), for the definition of a shippers' association must be interpreted in a manner which transcends the merely formal, and it is the economic reality behind the arrangements, not their form, which is determinative. To borrow from the language of the court in *Interstate Commerce Commission* v. *A. W. Stickle & Co.*, 41 F. Supp. 268, 273, (E.D. Okla. 1941): 'It is the effect of the plan, of what is actually being done, rather than the designation of it by the person concerned * * * that is to govern if the beneficial results intended by the Act are to be attained.' "

In determining whether the arrangements and practices of a particular operation are those of a shippers' association or a for-hire forwarder, Division 1 stated the ultimate inquiry to be, 316 I.C.C. at 278:

"Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration?. Both aspects of this question must be answered in the negative if the challenged operations are, in substance and reality, those of a bona fide group or association of shippers operating on a nonprofit basis for the purposes specified in the act. In short, the operations conducted in the name of a purported shipper association, in order to come within the statutory exclusion, must be conducted by the association, which at all times acts as *agent* for its shipper members who, *as its principals*, (1) possess the *exclusive* right and ability to control the operations and (2) assume, both jointly and severally, the essential risks entailed in conducting such operations. In sharing the transportation savings resulting from associating with other shipper-members, there is an obligation on each member of such association to bear the ultimate responsibility for the acts of each other performed in the operation of the association, as well as for the acts of the agent association which are within the scope of its authority. In these circumstances then, the association merely does for the members, as their agent, what they could do, legally and pursuant to the exclusionary provisions of section 402(c), for themselves. Cf. *Pacific Coast Wholesalers'* case, *supra;* and *ABC Freight Forwarding Corp. Ext.—Massachusetts*, 285 I.C.C. 276, *affirmed sub nom., ABC Freight Forwarding Corp.* v. *United States*, 125 F. Supp. 926 (S.D.N.Y. 1954), *affirmed per curiam*, 348 U.S. 967 (1955). (Emphasis the Division's).

On reconsideration the full Commission affirmed Division 1's determination that Atlanta Shippers was not an exempt shippers association but a freight forwarder. In doing so the Commission specifically approved the Divi-

sion's "conclusion that the shipper-members of the association may not free themselves of the characteristic burden of consolidating and distributing their collective goods and still claim the benefits of Section 402(c) with respect to such operations. . . ." 322 I.C.C. 273, 284, and agreed with the Division's substantive test, which it restated in the form of the following "basic question":

> "Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration"?

The full Commission also agreed that both parts of this question must necessarily be answered in the negative in order to avoid the conclusion that the purported members of a group or association are in fact purchasing transportation from a person or persons engaged in unlawful freight forwarding service. 322 I.C.C. at 283.

The Commission here resolved these questions favorably to the Association. But it cannot be gainsaid that its negative answer to the second prong of the question constituted a flat rejection of the statutory test laid down in the *Drum* and *Atlanta Shipper* decisions. Not one finding of fact was made in support of the Commission's conclusion that Pacific members "assume the essential risks and burdens of the Association." The facts before the Commission were undisputed, and showed beyond a shadow of a doubt that the members of Pacific have no obligation whatever to the association unless they choose to use its services; that under Pacific's corporate charter and the provisions of its by-laws, the members enjoy complete immunity from all debts and liabilities of the association; and that where a member chooses to use the services of Pacific, the member's only liability in doing so is to pay a predetermined, and fixed freight charge assessed by the

association for the complete movement of his goods from origin to destination. How, in the absence of any findings to the contrary, could the Commission rationally conclude that the essential financial risks and burdens of the transportation are borne by the members, when Pacific's charter, by-laws, the law of the state of incorporation, and the testimony of its own members conclusively established that such risks and burdens, already existing in the form of substantial operating deficits and liabilities, are the financial responsibility, not of the members, but of the association? If, as the record makes clear, the only obligation assumed by a member, besides a nominal and refundable membership fee, is the payment of his freight charges, which, of course, is the very same risk, and no more, that a shipper assumes in hiring the services of a regulated common carrier or freight forwarder, exactly what are the characteristic burdens of transportation which the Commission here held the members have assumed?

Having failed to consider much less decide the fundamental issue before it, the Commission, through counsel, defended its decision in the district court by arguing, directly contrary to its conclusion here, that Pacific's members were not required to bear the essential financial risks of the Association. Relying on the second report on reconsideration in *Atlanta Shippers*, it contended that the shipper members are free, under Section 402(c), to jointly and severally insulate themselves from all the risks and financial liabilities of the Association. Since the District Court believed the answer to the problem "more easily reached by . . . the terms of the statute itself" rather than in the "various interpretative pronouncements of the Commission on this subject," it did not pass on the merits of this contention. That the argument has no merit is apparent from a reading of the two reports in *Atlanta Shippers*.

In the first report in *Atlanta Shippers*, Division 1, while stating that it was "not essential to the disposition of

the instant proceeding," addressed itself to arguments of the parties as to whether or not an incorporated shippers' association qualified as a "group or association of shippers" under Section 402(c) of the Act. Answering this question in the negative, the Division was of the view that the "corporate form of organization is basically inconsistent with, and inimical to, the kind of agency relationship with its intended mutuality of obligation, which must be preserved between the group or association and the member-shippers." 316 I.C.C. at 286. The Division pointed out, however, that substance rather than form controlled, and that its determination on this issue did not necessarily preclude the enjoyment of the exemption by a group of shippers which, while actually incorporated, functioned as a *de facto* association in which its members jointly and severally assumed responsibility and liability for the activities of the organization. 316 I.C.C. at 288. On reconsideration, the full Commission disagreed with this dictum. In a closely divided decision, a bare majority of six commissioners said that a corporation should not be disqualified from the benefit of the exemption merely because of its corporate form of organization. The difference in view of the majority on reconsideration with that of the five member minority, which agreed with Division 1, was not whether the members should be free of the financial risks and burdens of the association, but whether "the fact of incorporation, standing alone," can "be said to alter significantly the regulatory status of the otherwise lawful freight consolidating and distributing activities of a group or association of shippers." 322 I.C.C. at 286.

This is clear from the opinions of Commissioner Tucker, who wrote the majority's view on reconsideration and also a concurring opinion to the decision of Division 1, in which he disagreed with the Division's conclusions on the corporate issue. In concurring with Division 1, Commissioner Tucker agreed with the Division's test of substance, but criticized its views respecting joint and several lia-

bility and corporate status as "an intricate maze of technical yardsticks and indicia, [which] lost sight of the basic purposes of the Act." 316 I.C.C. at 289, 290. The crux of his criticism was that, by laying down a predetermined test of partnership liability which excluded corporations from the exemption, the Division was establishing a formal rather than a substantive test which ignored the actual relationship and responsibilities of the members *vis a vis* an association. Thus, he stated, 316 I.C.C. at 291:

> "To some extent, the position of the majority [of Division 1] with respect to the corporate issue is predicated upon the erroneous assumption that a corporation, *ipso facto*, is founded to limit the responsibilities and burdens incurred by its members of shareholders. This may not necessarily be the case, however, for the basic distinction between an association and a corporation is not to be found in the extent of the liability which the members are required to assume. Such liability may be varied by special legislative enactments in the case of an association or by appropriate modification to a corporation's charter and bylaws. On the other hand, corporations frequently are formed as a means of limiting the liabilities and responsibilities of those who select that mode of operation and might well be used as a device to cloak the for-hire freight forwarding activities of persons other than the apparent shipper members in the guise of a legitimate shipper association. When this is the case, it is clear that the freight consolidating and distributing activities in question actually are being performed in violation of part IV of the act, and that the corporate device is being utilized as a mere subterfuge to escape regulation. Consequently, when confronted with incorporated 'associations' of shippers, the purposes of incorporation as well as the manner in which such 'associations' actually function must be evaluated in the light of all the relevant facts of record."

Writing for the majority on reconsideration, Commissioner Tucker expanded on this view, stating 322 I.C.C. at 287:

> "Nor are we able to perceive anything in either the makeup or functioning of an incorporated shippers' association which would automatically bring the operations of such an organization within the licensing provisions of the statute. In this connection, division 1 viewed the incorporation of a shippers' association as establishing a legal barrier or separation between the shippers and their corporation which effectively insulates such shippers from the burdens normally inherent in the considered transportation activities, and which constitutes such shippers as 'purchasers' of a complete freight forwarder service. This view, however, overlooks and disregards the basic nature of the relationship between the shippers and their group or association, which relationship exists whether or not the group or association is incorporated. *Pacific Coast Wholesalers' Case, supra.*"

Pointing out that "there can logically be no effective insulation placed between [an association's members] and third persons," Commissioner Tucker concluded the majority opinion on reconsideration by stating, 322 I.C.C. 288:

> "We do not mean to say, however, that the circumstances of incorporation, and the facts surrounding such incorporation, are not something to be weighed in ascertaining the basic nature and true status of purported shipper-association operations. We will go behind the corporate form in any case to establish the essential facts. See *Erie Endowment* v. *United States*, 316 F. (2d) 151 (claimed exemption from income tax). These facts, like all others attendant to a given operation, must be weighed and considered together in order to arrive at a correct assessment of the total fact situation. And where it appears that the corporate form of enterprise has been purposely chosen as a subterfuge or device by which to escape

regulation under the act, appropriate weight will be accorded that fact in finding the operations in question to be those for which authority is required."

While a narrow majority of the Commission disagreed with the Division's views as to joint and several liability, this disagreement stemmed not from any conviction that the members of an association were free to immunize themselves from all such liability, but from the fear that a predetermination of such liability as a statutory standard of qualification for the exemption, like the Division's disqualification of the corporate form, would place form over substance. Characterizing joint and several liability as " 'partnership' liability", the majority plainly regarded this aspect of the Division's opinion as the other side of the coin with respect to the corporate issue in that it would establish as a prerequisite to exemption a particular type of organizational structure, viz, a partnership, which would automatically exclude the corporate and other forms of organization. Thus, on reconsideration, Commissioner Tucker stated that "we will not gratuitously adopt conclusions imposing grave legal consequences upon organizational distinctions that are here of *de minimis* meaning and effect." 322 I.C.C. at 287. But, in concurring with Division 1, he made clear his belief that the members of an association were required to assume responsibility for the expenses and liabilities incurred in the transportation operations of an association, and that the nature and extent of this financial responsibility, both to the association and to other members and third persons dealing with it, were relevant factors in determining whether the organization was exempt under Section 402(c).[3]

[3] Commissioner Tucker stated, 316 I.C.C. at 292:

"The nature and extent of the actual responsibilities of association members vis a vis the association itself and third persons, as well as among themselves, also are germane factors in examining the status of an association under the statutory exclusion of section 402(c) of the act. But I confess I have

Both the majority and minority in *Atlanta Shippers* agreed that there is a basic nature in the relationship between the shippers and their association which cannot be altered by incorporation, citing the *Pacific Coast Wholesalers'* Case for this proposition. *Pacific Coast Wholesalers' Association, Investigation of Status*, 264 I.C.C. 134 (1945), findings modified on further hearing, 269 I.C.C. 504 (1947); reversed, *Pacific Coast Wholesalers' Association* v. *United States*, 81 F. Supp. 991 (S.D. Calif. 1949); aff'd per curiam, *United States* v. *Pacific Coast Wholesalers' Association*, 338 U.S. 689 (1950). There, this Court affirmed a decision of the district court which held that the basic nature of this relationship is one of *agency*, and that its existence between the members and the group or association is the determinative factor in passing on the bona fides of the association. The district court so held notwithstanding that Pacific Coast Wholesalers' Association was incorporated. Unlike the incorporated association here, however, the fact of incorporation there did not alter the principal-agent relationship between the association and shippers because the members specifically agreed in the corporation's by-laws "that in addition to the cost and expenses incidental to the consolidating, forwarding, and handling of shipments for its members, assessments may be levied by the directors from time to time against the members in amounts deemed sufficient to meet overhead, management, and administration expenses," and, in addition, agreed to provide working capi-

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no precise understanding of what will be required to establish the 'joint and several' liability discussed in the report, or of the intended meaning of that requirement. In fact, in any specific factual situation it probably would require an actual lawsuit to establish that there is or is not a joint and several liability among the members of an association. This type of uncertainty as to the effect of a law or rule leads much too frequently to unnecessary litigation. For a starting point, even under the majority opinion, I am not at all certain that it would be enough for an association to provide by charter that its members may be assessed periodically for the expenses and liabilities incurred in the operations of the association."

tal to the corporation. 264 I.C.C. at 135. Hence, the shipper members, as principals, specifically undertook to assume all liabilities incurred in their behalf by the incorporated association acting for them as their agent.

It is a fundamental rule of agency law that the principal is bound by, and liable for, the acts, whether tortious or contractual, which his agent does with or within the actual or apparent authority of the principal, which the agent does within the scope of his employment, or which the principal ratifies with knowledge of all the material facts surrounding and attending them. 3 Am. Jur. 2d, *Agency*, Section 261, pp. 626, 627. This rule is founded on the common law maxims that a duty rests upon every man, in the management of his own affairs, whether by himself or by his agents or servants, so to conduct them as not to injure another, and that if he does not do so, and another is thereby injured, he shall answer for the damage. The principle rests on public policy which protects third persons, and recognizes that it is the principal who makes it possible for the agent to inflict the injury. Id. Section 262. It is this basic relationship which must exist between a shippers' association and its members. And it is this relationship which the Commission has wholly ignored. Here, the members of Pacific do not, as principals, assume the financial risk and transportation burdens incurred on their behalf by their agent, the association. To the contrary, the members have completely nullified this relationship, by effectively freeing themselves from both joint and several liability for the acts and obligations of their agent.

Citing its decision in Ex Parte No. 73, *Regulations for Payments of Rates and Charges*, 326 I.C.C. 483 (1966) the Commission argued before the district court that Pacific's members are responsible for the underlying carriers' transportation charges incurred by the association in handling the members' freight, and therefore bear the essential risks and burdens of transportation. This argument

finds no support in Ex Parte No. 73 and ignores the practical and legal realities of commerce. The proceeding in Ex Parte No. 73, the so-called credit case, involved an investigation under Sections 3(2) and 223 of the Interstate Commerce Act, 49 U.S.C. §§ 3(2), 323, which prohibit extensions of credit by rail and motor carriers except under such rules and regulations as the Commission may prescribe. The Commission instituted the investigation to ascertain the problems and practices of the carriers in collecting their charges and determine whether the Commissions' existing credit regulations were adequate. On the basis of the factual record there developed, the Commission found that it was a common practice among shippers' associations operating under the Section 402(c) exemption to withhold sufficient information to enable the carriers to compute their tariff charges, with the result that delays up to 102 days were being experienced by carriers in the collection of their charges.

The Commission considered several proposals to solve this problem, two of which would have provided that a surety bond be posted by each member of an association, or, alternatively, required that each shippers' association furnish a single bond in the aggregate of $10,000 covering all charges of all carriers used by the association. The Commission refused to require such bonds on two grounds: first, that it would place an undue burden on non-profit shipper organizations which might be discriminatory to the shipper members *vis a vis* non-association shippers, and, second, because a surety bond aggregating $10,000 would not be sufficient to cover the large losses suffered by the carriers in the majority of instances shown on the record. 326 I.C.C. at 494, 495.

Another proposal was to require each shippers' organization to present carriers with a statement that the organization is not the beneficial owner of the goods being shipped, and advising the carriers of the identity of the beneficial owner. The railroads, concerned by the large

losses suffered when non-profit shipper organizations become bankrupt, opposed this alternative on the ground that the disclosure of the beneficial owner of a shipment would serve no purpose because such shippers' organizations operate through a corporate entity, and the members are therefore not liable for the debts of the corporation. The Commission nevertheless adopted this proposal. Citing the second report in *Atlanta Shippers* to the effect that the shipper members of an incorporated association are responsible as the beneficial owners of the goods moved, and that there can be no effective insulation between them and third persons, the Commission stated, 326 I.C.C. at 495:

> ". . . we assume that all railroads take precautions to assure that credit is not extended in the future to shippers who have filed for bankruptcy, or have not paid past due freight bills for other reasons. Carriers must keep in mind at all times that the extension of credit to shippers is the exception and not the rule. Therefore, they must not extend credit as a matter of course but only when they are assured of payment. For these reasons they should know the identity of the beneficial owners of the goods shipped by non-profit shipper organizations. We will expect them to require such organizations to furnish the names of the beneficial owners in the future in the bills of lading or at least require that the bills of lading incorporate by reference a document containing such names. We feel such a requirement will be acceptable because of its salutary aim."

While the Commission paid lip service to the concept enunciated in *Atlanta Shippers* that the members of an association are financially responsible for carriers' charges, the Commission completely avoided, as it has done here, the guts of the question before it, namely, how to reduce this principle to practical application when, as the railroads argued, the shipper members are insulated from all liability for the debts of the association through

the device of incorporation. The Commission's rule requiring disclosure of beneficial shippers may have some "salutary aim", but it completely misses the mark insofar as assuring that members assume the financial risks and transportation burdens of a shippers' association. As the language quoted above makes plain, the only sanction under the Commission's credit regulation requiring disclosure is that a carrier, like any prudent business organization, must cut off credit to a shippers' association when it becomes apparent, upon an accumulation of unpaid charges or bankruptcy, that the association is no longer deserving of credit.

While it may insist that the members of a shippers' association may not effectively insulate themselves from third persons, the plain fact is that the Commission is powerless to enforce this obligation. Indeed, the Commission held in Ex Parte No. 73 that it has "no authority under the act directly to regulate shippers," and that its power to enforce the payment of transportation charges by shippers is limited to "the power to prohibit carriers from extending credit to shippers who owe past due charges." 326 I.C.C. at 490. It made this holding in rejecting the contentions of several parties in the *Credit* Case that the Commission had authority to impose sanctions against shippers as well as carriers, and that it should exercise such authority by adopting credit regulations imposing punitive measures against shippers violating them. Stating that Sections 3(2) and 223 are clear and unambiguous, and that Congress would have specifically included shippers in these provisions had it been its intention, the Commission concluded that shippers cannot be made subject to its credit regulations. 326 I.C.C. at 489.

If the Commission has no power to enforce payment of a carrier's charges by a direct shipper who is party to the bill of lading, under what legal theory can it claim that a shipper member of an association is liable for transportation charges incurred by the association under its contract of carriage with the carrier? The Commis-

sion and the courts have long held that one who is not a party to the contract of transportation by a common carrier cannot be held liable by the carrier for tariff charges. See *New York Board of Trade* v. *Director General*, 59 I.C.C. 205, 209, citing *Central Railroad Company of New Jersey* v. *Anchor Line*, 219 Fed. 716. The Commission has also held that "the law seems to be well settled that the party to whom a shipment is consigned is the legal consignee and not the party in whose care the goods are shipped." *Smokeless Fuel Company* v. *Norfolk & W. Railway Co.*, 85 I.C.C. 395, 401 (1923). The Commission still holds to this view. *Detention of Motor Vehicles—Middle Atlantic and New England Territory*, 318 I.C.C. 593, 607, 608 (1962).

If the Commission is impotent to force a shipper to pay a carrier's charges, and a carrier cannot, as a matter of law, hold a member liable for the association's charges, on what rational basis could the Commission here conclude that a shipper member of Pacific, enjoying a complete immunity from the debts of the shippers' association, is responsible for transportation charges incurred by that association? The mere fact that the Commission says that members are liable to third parties for debts of the association incurred on their behalf doesn't make them so liable if, in law and in fact, they are insulated from such liability by the organizational structure under which the association does business. This painful lesson is the teaching of a recent decision of the United States District Court for the Central District of California in *North American Car Corporation, et al.* v. *United States Rubber Company, et al.*, No. 65-1431-IH (Unreported, decided May 8, 1967). A copy of the court's bench decision, together with pertinent portions of the oral argument to the court, are set forth in the Appendix hereto at page 103a.

There North American Car Corporation and General Transport Equipment Company brought a class action on behalf of themselves and approximately 153 other credi-

tors against United States Rubber Company and numerous other members of Continental Shippers Association, Inc. to recover approximately $550,000 in indebtedness incurred by Continental in performing transportation for defendants as a shippers' association under the exemption in Section 402(c). Continental had voluntarily petitioned and been adjudicated a bankrupt by the district court on November 8, 1963. (Case No. 163513-WB). Continental was incorporated as a non-profit corporation under the law of California, the provisions of which protected its members from liability for the debts of the corporation. Confronted with the bankruptcy of Continental, plaintiffs were faced with the considerable difficulty of fashioning a legal premise on which to pierce the corporate shield protecting the members from liability for the substantial indebtedness incurred on their behalf by the association. Relying on such arguments as the alter-ego theory and estoppel, plaintiffs contended that shippers purporting to engage in transportation activities as a shippers' association were required under Section 402(c) of the Act to assume liability for the debts of the association, and that the defendant members of Continental has therefore held themselves out to plaintiffs and the public as being liable for Continental's debts. Pointing to the majority opinion in the second report in *Atlanta Shippers*, defendants, while conceding that they were "puzzled a great deal . . . as to just what the Commission meant here," argued that the language of the majority opinion dealing with joint and several partnership liability must be read as not requiring as a condition of exemption that the members be liable for the debts of the association.

Agreeing with the defendants, the Court dismissed the suit for failure to state a cause of action, stating, *inter alia*:

> "The whole basis for this third count is the contention that there could be no exemption unless the members were personally responsible, and thus when Defendants formed a corporation which claimed the ICC

exemption the effort to qualify for the exemption was tantamount to affirmative representations that they would be so responsible.

"This count must likewise be dismissed. It seems abundantly clear to me that if the ICC ever so interpreted the Act so as to make an attempted qualification for the exemption depend upon personal liability, it no longer so interprets it. In fact, in Atlanta Shippers the ICC has said that personal liability is not a requisite or a requirement for securing the exemption—certainly not the type of joint and several personal liability sought to be asserted here.

"Surely I cannot now hold, as a matter of law, that the effort of those Defendants to qualify their corporation for the exemption contained an implicit promise to be personally liable, which implicit promise rests solely on their effort at qualification. If I interpreted this count as stating a good cause of action, I would have to impose liability based upon an alleged attribute or an alleged element of qualification which the administrative agency has now agreed was illegal and beyond its jurisdiction.

"Of course, we could have a case in which a member of a corporation expressly and clearly guaranteed a corporation's obligation under a mistaken belief that it was necessary for the individual to guarantee the obligations in order for that corporation to qualify for some special privilege or benefit. But that is not this case, as Plaintiffs concede. There is no claim here that any Defendant expressly guaranteed any obligation."

Among the class of creditors represented in this suit were several carriers who, having failed to recover transportation charges from the bankrupt shippers' association, unsuccessfully attempted through the class action to recover them against the members for whom the charges had been incurred. In addition to these carriers, many other creditors were required, as a result of that case, to absorb the financial losses which this Court, in *Drum*, said are the

characteristic burdens of a private transportation operation. Thus, the two lead plaintiffs, North American Car Corporation and General Transport Equipment Company, were large suppliers of transportation equipment and rolling stock, who unsuccessfully attempted to place on the shipper members of Continental responsibility for the payment of substantial rental charges for equipment, principally railroad piggyback trailers and railroad flatcars, which were incurred on their behalf by Continental in the performance of the transportation service.

Read in the light of the *North American Car* Case, the Commission's decision here renders the Section 402(c) exemption wholly incongruous. On the one hand the Commission, while insisting that an association's members bear the essential risks and burdens of the operation, refuses, on some nebulous ground of lack of authority, to impose any restriction on the right of members to immunize themselves from these obligations. On the other hand, a federal district court has held that, since the Commission exercises no authority to impose liability on shipper members, they cannot be held liable for the debts of an association incorporated under state law protecting members from such liability. If the district court's interpretation of *Atlanta Shippers* is correct (and the Commission argued before the district court in this case that it was), then the Commission's construction of Section 402(c) is plainly irrational. If, as the Commission concedes, a relevant test of the statute requires the members to assume the association's essential risks and burdens, the Commission obviously has authority to impose membership liability as a condition to exemption. Indeed, Commissioner Tucker suggested this as a minimum requirement in the majority opinion in *Atlanta Shippers*.[4] Without such a requirement, the *North American Car* Case makes clear that shippers can and will do precisely what the Court in Drum said cannot be done, i.e., shift

[4] *Supra*, p. 27, fn. 3.

the essential transportation burden—the risk of financial loss—from themselves to someone else.

II

Turning to the procedural questions presented, there can be no doubt that the Commission's order fails to comply with the minimal standards of Section 557 of the Administrative Procedure Act, 5 U.S.C. § 557, requiring agencies to make findings and conclusions and state the reasons for their decisions. This error was compounded, in turn, by the district court's failure to perform its duty under Section 706 of the Administrative Procedure Act, 5 U.S.C. § 706, by deciding the relevant questions of law before it on appeal of the Commission's order.

As stated, the Commission's order, and the examiner's report it adopts, contain no findings of fact or statement of its reasons or the basis for the ultimate conclusion that Pacific's members bear the essential risks and burdens of the association. The Commission's order simply cites, with no discussion, two of its decisions, *Atlanta Shippers*, and *National Motor Freight Traffic Association, et al.* v. *New Hampshire Shippers Cooperative, Inc., et al.*, 323 I.C.C. 658 (1964). In the latter case, no issue under the financial risk and burden test was raised, the Commission's decision turning entirely on whether the members exercised adequate supervision and control over that association's operations.

As for *Atlanta Shippers*, that decision provides no support for the Commission's order here. In the first place, that decision has never been subject to judicial scrutiny. There, the association was incorporated, and the Division found its members failed to assume its financial risks and burdens, which finding was not disturbed by the full Commission on reconsideration. But, as the Division made clear, the question of the nature and degree of member risk was "not essential to the disposition" of the proceeding, 316 I.C.C. at 286, and the full Commission, in affirm-

ing the Division on reconsideration, determined the association not to be bona fide on other grounds, principally because it had been organized and was controlled by an entrepreneur rather than the members. Thus, while practically all segments of the regulated surface transportation industry were parties adverse to the association in that proceeding, and urged a strict standard respecting membership risk and burden, the Commission there held the operation to be unlawful, and there was therefore no basis on which they could have appealed the correctness of the Commission's dicta views on the question of risk and liability.

It was not until this proceeding that the precise question was squarely raised before the Commission whether the members of an incorporated association, who were immunized from liability for all corporate debts, adequately shouldered the financial risks and burdens of transportation. It was not until this proceeding that the Commission was required to pass on this issue in order to determine the status of an association under the Section 402(c) exemption. Hence, the Commission's reliance on *Atlanta Shippers* here merely begged the question. Moreover, in view of the sharp conflict of opinion among the members of the Commission, and the fact that the narrow majority of the full Commission itself agreed on a test of substance in which the degree of actual responsibilities of members *vis a vis* the association and third persons was a relevant inquiry in construing the exemption, *Atlanta Shippers* shed no light on the reasoning underlying the Commission conclusion here, where no such test was applied on the basis of any inquiry.

Under these circumstances, the district court's *per curiam* affirmance of the Commission's order was clearly unwarranted. Since the Commission defended its order on the basis of the Report on Reconsideration in *Atlanta Shippers*, this case was, in effect, the first judicial test of the Commission's interpretation of Section 402(c) on

this important question. Briefs and argument to the court were framed within the *Atlanta Shippers* decision viewed in the light of the court's holding in the *North American Car* Case, and no party contended that the question of membership risk could be resolved on the basis of the language of the statute. Hence, the district court's summary holding that the considerable discussion "by the Commission itself, to the meaning of various interpretive pronouncements of the Commission upon this subject," was tantamount to a flat rejection of the grounds on which the Commission relied to support its order. And by affirming that order on the basis of "direct consideration of the terms of the statute itself," the court substituted its own rationale for that of the Commission.

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, Appellants urge that jurisdiction be noted, and that the judgment of the district court be reversed and the case remanded to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas M. Knebel, one of counsel for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 29th day of July, 1968, I served copies of the foregoing document on the parties hereto, postage prepaid, to the following:

On Honorable Erwin R. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington, D. C. 20530.

On Robert W. Ginnane, Esq., General Counsel, and Manny H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

On Ronald N. Cobert, Esq., 600 Madison Building, 1155 15th Street, N.W., Washington, D. C. 20005.

On James T. Johnson, Esq., 1610 IBM Building, 1200 Fifth Avenue, Seattle, Washington 98101.

THOMAS M. KNEBEL

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No. 855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.
COMMON CARRIER CONFERENCE-IRREGULAR ROUTE
REGULAR COMMON CARRIER CONFERENCE,
Appellants,

v.

UNITED STATES OF AMERICA

AND

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

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IN THE

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---

APPENDIX TO JURISDICTIONAL STATEMENT

APPENDIX

RELEVANT STATUTES

Interstate Commerce Act, Section 402(a)(5), 49 U.S.C. § 1002(a)(5):

Section 402(a) For the purposes of this part—

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

Section 402(a)(7), 49 U.S.C. § 1002(a)(7):

(7) The term "service subject to this part" means any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this part to perform or provide; but such term shall not include that part of the undertaking of any such person for the performance of which the services of an air carrier subject to the Civil Aeronautics Act of 1938, as amended, are utilized, or for the performance of which transportation by motor vehicle exempted under the provisions of section 203(b)(7a) of this Act is utilized.

Section 402(c)(1), 49 U.S.C. § 1002(c)(1):

> (c) The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or . . . .

Section 410(a), 49 U.S.C. § 1010(a):

> Section 410(a) No person shall engage in service subject to this part unless such person holds a permit issued by the Commission, authorizing such service; except that (1) any person engaged in service subject to this part when this section takes effect may continue to engage in such service for a period of one hundred and eighty days thereafter without a permit, and (2) if application for a permit is made to the Commission by such person within such period, such person may, under such regulations as the Commission shall prescribe, continue to engage in such service subject to this part until otherwise ordered by the Commission.

Administrative Procedure Act

5 U.S.C. § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

* * * * *

> (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2625-66

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC., AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.,
Intervenors.

Decided December 6, 1967

Mr. Bryce Rea, Jr., with whom *Mr. Thomas M. Knebel* was on the brief, for plaintiffs.

Mr. Manny H. Smith, Attorney, Interstate Commerce Commission, with whom *Mr. Edwin M. Zimmerman*, Acting Assistant Attorney General, *Mr. David G. Bress*, United States Attorney, *Mr. Robert W. Ginnane*, General Counsel, Interstate Commerce Commission, and *Mr. John H. D. Wigger*, Attorney, Department of Justice, were on the brief, for defendants.

Mr. James T. Johnson for intervenor Pacific Progress Shippers Association, Inc.

Mr. Ronald N. Cobert was on the brief for intervenor American Institute for Shippers' Associations, Inc.

Before PRETTYMAN and WILBUR K. MILLER, Senior Circuit Judges, and McGARRAGHY, District Judge.

PER CURIAM: The question posed by this complaint is whether the Interstate Commerce Commission erred in granting to Pacific Progress Shippers Association, Inc., an exemption from the license requirements of the statute dealing with freight forwarders. The pertinent section [1] provides that the license requirements "shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates * * *."

The findings clearly show these terms to be descriptive of the organization and operation of the association here involved. The evidence in the record amply supports these findings. The examiner and the Commission so concluded. We agree.

Much discussion is devoted by counsel for all parties, and by the Commission itself, to the meaning of various interpretative pronouncements of the Commission upon this subject. We think the answer to the problem is more easily reached by direct consideration of the terms of the statute itself. The complaint will be

Dismissed.

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[1] Sec. 402(c), Pt. IV, Interstate Commerce Act, 56 STAT. 284 (1942), 49 U.S.C. § 1002(c).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2625-66

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.,

Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,

Defendants.

JUDGMENT

This action having come on for hearing before this properly constituted three-judge District Court, and the issues having been duly heard and an opinion having been duly rendered on December 6, 1967:

IT IS ORDERED AND ADJUDGED, That the complaint, challenging the lawfulness of the order of the Interstate Commerce Commission of June 20, 1966, in Docket No. MC-C-3192 (Sub-No. 33), *National Motor Freight Traffic Association, Inc., et al.* v. *Pacific Progress Shippers Association, Inc., et al.*, 105 M.C.C. 199, be, and hereby is, dismissed on the merits, with prejudice.

Dated this 19th day of March, 1968.

BY THE COURT

/s/ E. BARRETT PRETTYMAN
E. BARRETT PRETTYMAN
United States Senior Circuit Judge

/s/ WILBUR K. MILLER
WILBUR K. MILLER
United States Senior Circuit Judge

/s/ JOSEPH C. MCGARRAGHY
JOSEPH C. MCGARRAGHY
United States District Judge

APPROVED AS TO FORM

/s/ BRYCE REA, JR.
BRYCE REA, JR.
Counsel for plaintiffs

/s/ DAVID G. BRESS
DAVID G. BRESS
United States Attorney

/s/ JOHN H. D. WIGGER
JOHN H. D. WIGGER
Counsel for defendant
United States of America

/s/ MANNY H. SMITH
MANNY H. SMITH
Counsel for defendant
Interstate Commerce Commission

/s/ RONALD N. COBERT
RONALD N. COBERT
Counsel for intervening defendants

INTERSTATE COMMERCE COMMISSION

No. MC-C-3192 (Sub-No. 33)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.,

v.

PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC., ET AL.

Complainants found to have failed to establish that defendants are in violation of section 410(a) of the Interstate Commerce Act as alleged in the complaint. Complaint dismissed.

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D.C., on the 20th day of June 1966.

Upon consideration of the complaint and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions thereto filed by complainants, intervener Freight Forwarders Institute, and the Commission's Bureau of Enforcement, and the replies to the exceptions filed by defendants and by interveners, National Conference of Non-Profit Shipping Associations, Inc., and American Institute for Shippers' Associations, Inc.; and

It appearing, That, except as hereinafter noted, the exceptions and replies raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of

such nature as to require the issuance of a report by division 1 discussing the evidence in the light of such pleadings;

It further appearing, That the issue of whether a bona fide shipper association lawfully may co-load its members' shipments with shipments of other shipper groups or associations also operating under section 402(c) of the Interstate Commerce Act is presently pending determination before the Commission in No. MC-C-3192 (Sub-No. 7) *National Motor Freight Traffi Association, Inc., Et Al.* v. *Columbia Shippers Association, Et Al.*; that, in the circumstances, the resolution of that issue herein, as attempted by the examiner, would be inappropriate; and that this Commission, in the circumstances, should reserve jurisdiction in this matter;

And it further appearing, That the examiner (1) found that defendants have not been shown to be engaged in services as freight forwarders, as that term is defined in section 402(a)(5) of the act, and (2) recommended that the complaint be dismissed;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the replies thereto, and the light of the decisions in *Atlanta Shippers' Assn., Inc.—Investigation*, 322 I.C.C. 273, and *National Motor Freight* v. *New Hampshire Shippers Co-op.*, 323 I.C.C. 658, does not warrant a result different from that reached by the examiner; and that the statement of facts, the findings, and the conclusions of the examiner, with the exception of those conclusions relating to the co-loading of freight referred to in the second "appearing" paragraph herein, being proper and correct in all material respects, should be, and they are hereby affirmed and adopted as our own; and

It is ordered, That the complaint be, and it is hereby dismissed, subject, however, to the right of the Commis-

sion, which is hereby expressly reserved, to reopen this proceeding in order to assure compliance with the findings made in No. MC-C-3192 (Sub-No. 7), now pending determination, with respect to the co-loading issue.

By the Commission, division 1, Commissioners Murphy, Goff, and Deason.

The statement of facts, conclusions, and findings of the examiner follow:

By complaint filed September 11, 1963, as amended, National Motor Freight Traffic Association, Inc., The Regular Common Carrier and the Irregular Route Common Carrier Conferences of the American Trucking Associations, Inc., all of Washington, D. C., whose members are motor common carriers of property operating, collectively throughout the United States, allege (1) that defendants Pacific Progress Shippers Association, Inc., (Pacific or Association), Seattle, Wash., (including the named officers and trustees thereof), Frank Kelley, (Kelley), doing business as Olympic Traffic Service, (Olympic), Seattle, who is managing agent of Pacific; Pennant Shippers Agents, Inc., (Pennant), New York, N. Y., and Philadelphia, Pa.; Freight Delivery Service, Atlanta, Ga., hereinafter considered the principal defendants), and certain named shipper-receiver defendants,[1] (hereinafter considered the secondary defendants), (a) have been and are engaged in transporting, and arranging for the transportation of, property in interstate commerce for compensation; (b) assembling and consolidating and providing and arranging for the assembly and consolidation of individual shipments of such property for compensation; (c) performing and providing and arranging for the performance of such consolidated shipments for compensation; (d) performance and providing and arranging for the

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[1] The names and addresses of all of the defendants are listed in appendix A hereto.

performance of break-bulk and distributing operations with respect to such consolidated shipments for compensation; (2) that the services described are being performed at points in Washington, Oregon, Georgia, North Carolina, Illinois, Pennsylvania, and New York; (3) that the operations complained of are in violation of sections 206(a), 209(a), 211(a), and 410(a) of the Interstate Commerce Act, in that such operations are those of common or contract motor carriers, brokers, and freight forwarders subject to the certificate, license, or permit requirements of said act, and are being performed without the necessary authority issued by this Commission; (4) that the other (or secondary) defendants named therein jointly and severally aid and abet defendants Pacific and Kelley in the performance of all of the acts alleged therein to be in violation of the act. Complainants request that an order be entered, after hearing, directing each of the defendants to cease and desist from the alleged violations and to grant such other and further relief as the Commission may deem proper in the premises.

The complaint specifically alleges that defendants Pennant Shippers and Freight Delivery Service perform transportation by motor vehicle for defendant Pacific in New York and Philadelphia, and Atlanta, respectively.

This matter was referred to the examiner by the Commission for hearing and the recommendation of an appropriate order thereon. Hearings were held in Seattle, March 29 to April 1, 1965, and June 14 to 16, 1965. The Commission's Bureau of Enforcement[2] (Bureau), was authorized and directed by the Commission's order of October 28, 1963, to participate as a party herein for the purpose of presenting evidence and making representations on the issues involved. Leave to intervene was granted by the Commission to the Freight Forwarders Institute and the National Conference of Non-Profit Shipping Associa-

[2] Prior to June 6, 1965, this Bureau was designated as the Bureau of Inquiry and Compliance.

tions, Inc., the former on behalf of complainants, the latter as its interest may appear. Neither of these interveners appeared and presented evidence at the hearings. Post hearing briefs were filed September 8, 1965, by complainants, the Bureau, and on behalf of the principal and numerous co-defendants. A separate brief was filed by defendant Pennant.

Complainants, on brief, abandoned their allegations that Pacific and Kelley, aided and abetted by the co-defendants, are performing common and/or contract carrier operations, and acting as brokers, in violation of sections 206(a), 209(a), and 211(a), respectively, of the act,[3] and confine their arguments to their allegations that the defendants, jointly and severally, are violating part IV of the act and in that they are engaged in the business of freight forwarding, as defined in section 402(a)(5) of the act, without a permit from this Commission in violation of section 410(a) of the act. Similarly, the Bureau's brief presents no issues under the aforementioned part II sections of the act. In view of this and the absence of any evidence to support the alleged part II violations, consideration herein is limited to the allegations in the complaint that the defendants are engaged in freight forwarding services in violation of the provisions of the statute set forth in section 410(a) of the act.

Complainants' evidence was adduced through five subpoened witnesses; the Bureau's evidence through nine subpoened witnesses and a special agent of said Bureau; Pennant's evidence, on its own behalf, through one witness, and the evidence on behalf of Pacific and the remaining defendants, except Freight Delivery Service, through three witnesses.

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[3] It is unnecessary, therefore, to consider the subsidiary question in Pennant's brief whether it is performing motor carrier operations in New York and/or Philadelphia.

PLEADINGS

The complaint originally named 97 defendants, 26 of whom were deleted by amendments prior to the hearing, leaving a present total of 71.

A formal answer, including a motion to dismiss the complaint, filed on behalf of 73 of the original 97 defendants, (including defendants Pacific, its officers, and its managing agent Kelley), avers that the defendants named therein are members of Pacific; that Pacific is a group or association of shippers organized and operating as a nonprofit corporation for the purpose of consolidating or distributing freight for the members thereof on a nonprofit basis to secure the benefits of carload, truckload, or other volume rates, authorized under section 402(c) of the act; that the named defendants utilize from time to time the services of the Association for that purpose; that said named defendants deny that Pacific performs any transportation whatsoever, and affirmatively alleges that any transportation performed for said Association is performed only by duly authorized carriers.

The principal grounds urged in the aforesaid motion to dismiss the complaint are that the complaint is loosely prepared and names many defendants having no connection with the Association; that the activities by defendants alleged therein are so remote from anything any of the said defendants, including Pacific and Kelley, have ever engaged in that it is difficult to believe complainants have made any investigation of Pacific's activities; that the Commission conducted its own investigation of Pacific's background, organization, and operation; that it fails to state reasonable grounds for action by the Commission, and should be dismissed without hearing; that it be dismissed pursuant to rule 1.36(a)[4] of the Commis-

[4] Rule 1.36(a) provides, in part, that a defendant may file with his answer a motion that the allegations in the complaint be made more definite and certain.

sion's General Rules of Practice, section 5(a)(3)[5] of the Administrative Procedure Act, and section 403(f)[6] of the Interstate Commerce Act, because of lack of legal sufficiency appearing on the face thereof; that the Commission lacks jurisdiction in a civil complaint proceeding over the defendants on whose behalf this answer is filed since none of them is a carrier subject to any part of the act, and that it is only Pacific that complainants contend is a freight forwarder; that the procedure contemplated under the Commission's rule 1.27(c),[7] pursuant to which complaint is brought, is available only when redress is sought for unlawful activities of a "person subject to the act," a category in which none of these defendants falls, and that complaint is so general, vague, and in many respects erroneous that it should be dismissed because of lack of legal sufficiency appearing on the face thereof.

Defendants in the alternative move that complainants be required to make their allegations more definite and certain so that they and the Commission may be more fully and completely advised of the specific facts claimed to constitute such violations; name the section claimed to have been violated by each defendant, and to strike as defendants those who cannot be connected by specific allegations with the overall operation complainants contend is illegal; that thereafter, the defendants be given an opportunity to file supplemental answers.

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[5] Section 5(a)(3) of the Administrative Procedure Act (5 U.S.C. 1004(a)) provides under Notice that "Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) the matters of fact and law asserted. * * *."

[6] Section 403(f) of the Interstate Commerce Act provides, in part, that "Whenever the Commission is of opinion that any complaint does not state reasonable grounds for action on its part, it may dismiss such complaint."

[7] Rule 1.27(c) provides, in part, "If complaint is made with respect to through transportation by continuous carriage or shipment, all persons subject to the act participating therein, and against which an order is sought, should be made defendants. * * *."

Said motion, except to the extent that the complaint had already been amended to eliminate certain of the defendants, was overruled by the Commission's order of February 23, 1965, for the reason that no sufficient or proper cause appeared for granting the relief sought.

A formal answer to the complaint filed by defendants Pennant [8] of New York and Philadelphia, (Pacific's consolidation agents at both cities), denied the allegations concerning violations of the act, "except that it acts as a consolidation agent for compensation, in Pennsylvania."

Defendant Freight Delivery Service,[9] (Pacific's consolidation agent at Atlanta), filed a letter-answer to the complaint, denying the alleged violations of the act, averring that it performs a pickup and consolidation service in the Atlanta metropolitan area under a contract with Pacific; that freight brought to its terminal is consolidated and loaded onto a railroad freight car and shipped to Pacific; that freight handled by this defendant for Pacific's account is also delivered to its terminal by certificated motor carriers for transshipment to the west coast.

Following conclusion of complainants' direct case, and prior to resuming the continued hearing on June 14, 1965, a motion filed with the Commission on June 7, 1965, on behalf of 68 of the 71 defendants, to which the Bureau filed a reply on June 7, 1965, requesting dismissal of the complaint on the ground that complainants had failed to sustain their burden of proof by adducing any evidence substantiating their allegations of illegal operation, was overruled by the Commission's order of June 8, 1965, for

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[8] The complaint names Pennant Shippers Agents, Inc., of New York and Philadelphia as two separate defendants, but this answer treats Pennant as a single defendant. These two defendants, for convenience, will also be treated herein as a single defendant.

[9] Freight Delivery Service did not appear at the hearing, nor was it represented by counsel. As shown in this report, the subject Association discontinued operations from the southeastern area in January 1964.

the reason that no sufficient cause appeared for granting the relief sought.

Defendant Kelley is sole proprietor of the Olympic firm, which audits freight bills and renders traffic consulting services for its shipper clients.

GENESIS OF DEFENDANT PACIFIC

Defendant Pacific was incorporated as a domestic corporation under the laws of the State of Washington, on June 9, 1961, and commenced operations on July 17, 1961. Its forerunner was an unincorporated association called Progressive Shippers Association, formed in November 1960, and continued as such until it became a corporation on June 9, 1961, and its name changed to Pacific Progress Shippers Association, Inc. No shipments were handled by the prior entity during the organizational period of 7 months, i.e., from November 1960, to June 1961. Its initial meeting, held on November 10, 1960, at the Four Winds Restaurant, Seattle, was an informal gathering of the shippers in the Seattle area. While the record is not specific as to the number of persons attending this meeting, it appears that approximately eight persons, including Kelley and defendant Iverson, were present. Defendant Iverson was appointed interim president of this informal group, and requested to investigate further the possibility of organizing a shippers' association, and at a later date to call a meeting of all persons interested in establishing such an organization.

Two meetings were subsequently held on April 19, 1961, at both of which Iverson presided as interim president. The principal purposes of the first of these two meetings were to solidify the association into a group of shippers and receivers of freight by pooling shipments to and from points in the west, and to form a corporation to begin loading freight from New York, Philadelphia, and Chicago, starting June 1, 1961, and from Charlotte, N. C., and Atlanta, Ga., on August 1, 1961, and from California

on January 1 or February 1, 1962. It was unanimously agreed at this meeting that a corporation be formed to pursue the objectives sought, and to require an initiation fee of $100 from each member. Defendants Iverson, MacKenzie, Holder, Phillips, and Bean, were elected members of the Organization Committee.

The second of these two meetings of April 19, 1961, was an Organization Committee meeting. Two more names were added to the Organization Committee, viz, defendants Colcock and Armitage, the former serving as acting secretary of this committee. Other actions approved at this meeting included appointment of Olympic as traffic consultant and managing company of the affairs of the corporation, whose operating fee would be 33-cents per hundredweight,[10] subject to review on January 1, 1962; the obtaining of bids for legal counsel for the association; establishment of a checking account in the name of Progressive Shippers Association in the National Bank of Commerce, Seattle, for deposit of initiation fees received from applicants; submission of proposed bylaws patterned after those of similar associations, to counsel for checking and revision, and the return thereof to the Committee for possible revision or approval of the Organization Committee; authorizing the management company to draw checks from the checking account for services and expenses incurred in performing work for the Association, and permitting the management company to authorize certain persons in its employ to write checks on said account, the management company to submit expense accounts; management company authorized to send representatives to eastern cities to negotiate bids for consolidation of shipments by loading companies for the Association; counsel to investigate from three names submitted

[10] The fee of 33-cents was to cover administrative costs, Seattle office and warehouse space, personnel, office supplies, billing and traffic consultation service in connection with association business, to be contracted between the corporate body and the management company.

to him the name to be chosen for the corporation; the acting secretary to mail copies of the minutes of the formation and Organization Committee meetings to all applicants for membership.

At the first meeting of the board of trustees, held on June 6, 1961, defendants Iverson and Fesenmaier acted as chairman and secretary, respectively. Trustees Iverson, MacKenzie, Colcock, Holder, and Bean, (defendants herein), were elected president, vice president, secretary, treasurer, and assistant treasurer, respectively. Other principal actions taken at this meeting included instructions that the attorney arrange for the filing of the articles of incorporation with the secretary of state of the State of Washington, and with the auditor of King County, State of Washington; that the secretary prepare a form of membership certificate to be issued to each member; adoption of a banking resolution and a resolution appointing Olympic as traffic consultant and management agency for the Association; report by Kelley of arrangements made for commencing operations from New York, Chicago, Philadelphia, Charlotte, and Atlanta, on or about July 15, 1961; approval and ratification of organizational expenses totaling $1,810.59 submitted by Kelley made from the membership account; approval of reimbursement to Kelley of itemized expenses totaling $1,150.79, incurred by Olympic on behalf of the Association prior to April 19, 1961, and $1,891.62 incurred since April 19, 1961, it being understood that these amounts include all of the expenses incurred by the Association prior to and since April 19, 1961, except the professional services of the staff of Olympic, and the Association's prorata share of office rent, telephone, and automobile expenses; that the management company was authorized to designate Pennant Shippers as the Association's loading company in New York and Philadelphia, and Chicago Terminal Clearance as its loading agent in Chicago; that James T. Johnson be retained as the Association's legal

counsel on a retainer basis of $100 per month, commencing as of June 1, 1961, and that he be paid $500 for his services in organizing the corporation; that the accounting firm of Benson & McLaughlin be designated as its certified public accountant; that Kelley be authorized to make a trip to Los Angeles, Calif., Chicago, New York, Atlanta, and Charlotte, to work out further details of arrangements with the loading companies.

On the same date, to wit, June 6, 1961, the members of Pacific held their first meeting, at which 22 firms were represented. Kelley and Fesenmaier of Olympic, attorney Johnson, and Kay Jones, a certified public accountant, were also present. Iverson presided and Fesenmaier acted as secretary in the absence of the secretary. Actions taken at the immediate board meeting were reviewed. The purpose of this first membership meeting was to approve the bylaws, which were unanimously accepted. Kelley reported that 81 members had been received into the Association, and that operations from New York, Chicago, Philadelphia, Charlotte, and Atlanta, would commence about July 17, 1961; Kelley answered questions posed by the members, and stated that instructions for utilizing the Association's services would be prepared well in advance of the date operations would commence. Thus, the organization was finalized and brought into being as a corporation and the name changed from Progressive Shippers Association to Pacific Progress Shippers Association, Inc.[11]

PACIFIC'S ARTICLES OF INCORPORATION

The Association's articles of incorporation were executed on June 6, 1961. Article III, section 1, thereof states the following purposes for which Pacific was formed:

(a) To procure the pooling, consolidating, transportation and distribution of freight, merchandise and

[11] The change in name was to avoid a conflict with another shippers association operating under a somewhat similar name.

products for its members on a nonprofit basis for the purpose of securing the benefits of carload, truckload or other volume rates.

(b) To obtain for its members prompt, economical and efficient transportation and distribution of its merchandise and products.

(c) To promote and facilitate the exchange of ideas and information concerning traffic and transportation matters.

(d) To promote, encourage and support the establishment and maintenance of fair and equitable rates for the handling and transportation of the freight, merchandise and products of its members and to arrange for appearances before regulatory bodies regarding rate or tariff matters or in connection with other proceedings in which the members may be interested.

(e) To acquire, hold, lease, sell or mortgage real or personal property, raise funds, to borrow money and to do any and all things necessary or convenient to carry out its lawful purposes.

(f) To elect such officers and appoint such agents as the business of the corporation shall require and to allow and pay them suitable compensation.

(g) To admit as members those applicants qualifying for membership under the By-Laws of the corporation and whose application is approved in accordance with the provisions of the By-Laws.

Article III, section 2, states that this corporation is not formed to engage in any business, trade, avocation or profession for profit or gain; that it shall not entered into any agreement or combination or act in restraint of trade, or to fix or establish the price of any commodity, or to limit or regulate the production or distribution of any commodity. Article V states that the corporation shall have no capital stock; that the interest of each incorporator or member shall be equal to that of any other, and no incorporator or member may acquire any interest

which will entitle him to any greater voice, vote, authority or interest in the corporation than any other member. Article VI relates to issuance by the corporation of membership certificates assignable only as provided by the By-Laws, and that a membership may be terminated by voluntary withdrawal, expulsion, or death. Article VII provides, among other things, the manner and method of adopting the By-Laws, which shall be by vote of a majority of all members of the corporation. Article VIII states that the affairs of the corporation shall be managed by seven trustees, and names Iverson, Holder, Bean, Colcock, (Seattle), MacKenzie and Armitage, (Portland, Oreg.), and Phillips, (Spokane), (all defendants herein), as the persons to serve as trustees until the election of their successor trustees by the members at the first annual meeting of the corporation in September 1961.

Article IX states:

> One of the purposes of the incorporators in organizing this corporation is to form an association which will qualify for the exemption provided by Title 49 U.S.C.A., Sec. 1002(c) [Sec. 402(c)], of the Interstate Commerce Act, which accords an exemption from the freight forwarder provisions of the Interstate Commerce Act to the operation of an association of shippers in consolidating or distributing freight for themselves or for members thereof on a nonprofit basis for the purpose of securing the benefits of carload, truckload or other volume rates. Thus, membership in this corporation shall be limited to individuals, co-partners and corporations, except common or contract carriers, actually engaged in the shipment and receipt of freight. Memberships shall be in the name of the individual, co-partnership or corporation which actually ships or receives freight, but each member shall designate an individual who will represent and speak for the member.

Pertinent excerpts from the By-Laws are reproduced as appendix B hereto.

The next meeting of the board of trustees, held on July 11, 1961, was attended by trustees Colcock, Holder, Bean, and Armitage. Kelley, as traffic consultant, and Johnson, as attorney, were also present. In the absence of the president and vice president, secretary Colcock presided, and Kelley acted as secretary of the meeting. Among the principal subjects discussed was a complaint from Worldwide Distributors, Inc., a member, regarding the bonding procedure whereby each member is required to furnish a bond. It was decided that inasmuch as most of the members had the required bond, it would not be desirable to change the procedure. Kelley, reporting that the accounting firm of Benson & McLaughlin had withdrawn, was authorized to engage Moss Adams & Company as the corporation's certified public accountants. The board directed the management firm, Olympic, to hold all corporation records in the strictest confidence and to show them to no one without specific approval of the corporation's attorney. Kelley reported a total of 94 membership fees had been paid; that 53 members had made contributions to the revolving fund in the total amount of $4,986.80. The management firm was authorized to finalize negotiations with Western Cartage, Inc., as the corporation's unloading and delivery agent in Seattle, and with General Transport Company for performing similar functions in Portland, Oreg. The board concurred in the appointment of Robinson Jenner, Inc., as the corporation's insurance agent. As managing agent, Olympic was authorized to arrange for coloading with other nonprofit associations when it seemed such coloading advisable. The board approved General Transfer & Storage Co., Charlotte, and Freight Delivery Service, Atlanta, as the corporation's loading agents at those southern points. The loading charge at Charlotte was established as 35 cents for blankets and 20 cents for other freight; the loading charge at Atlanta was fixed as 27 cents for piece and white goods, and 35 cents for other freight. The board concurred in the management's recommendation that a minimum

charge be established on shipments in an amount of at least 25 cents per shipment. A list of expenses paid by Olympic was read by Kelley for which it sought reimbursement. The board directed the treasurer to review these expenditures, after which they would be reviewed by the board when the books had been set up by the corporation's accounting firm. Kelley also reported on his trip to San Francisco, Los Angeles, Atlanta, Charlotte, New York, and Chicago.

Kelley's appointment as Pacific's managing agent is based on a written contract executed between him and Pacific on August 25, 1961. (See appendix C for copy of this contract.) As noted therein, this contract provides, among other things, that Kelley, as manager, shall have only such powers and authority as are delegated to him by Pacific's board of trustees; that his compensation for the services and expenditures outlined therein will be 33 cents [12] per hundredweight on all shipments handled by Pacific. This contract is terminable by Kelley on 45 days' notice. As manager, Kelley's duties include the handling of all administrative work of the association, preparation of billings to members, collection and receipt of payments, disbursement of funds in payment of transportation, storage and handling charges, and other obligations incurred by the Association. He is required also to provide the personnel necessary to handle the routing and day-to-day traffic problems of the Association, to furnish office space, equipment, supplies, postage, freight bills, automobile and telephone expenses, except long-distance charges. This agreement further provides that it relates only to the manager's compensation from the commencement of actual operations on July 17, 1961, and that Kelley is entitled to additional compensation for services performed for the Association during its organizational period. It also recognizes that Kelley, doing business as Olympic, is

[12] This amount was subsequently increased to 35-cents per hundredweight. The contract provides for an adjustment in compensation by mutual agreement of the parties.

engaged in other traffic consulting activities and will not devote all of his time, attention, and energies to Association matters.

The record is imprecise as to Pacific's total membership, since many members withdrew their membership after the complaint herein was filed, and some have since gone out of business. The membership list appended to Pacific's financial report for the year 1964, prepared by its certified public accounting firm, shows a total of 132 members, but this list is now inaccurate inasmuch as many members have withdrawn from the Association since that time. Based on an exhibit introduced by the Bureau, reflecting the membership roster, prepared some time in 1963, the Association at that time had a total of 178 members. The present total appears to be approximately 103 members.

EVIDENCE PRESENTED BY THE PARTIES

Witness Risser, a self-employed traffic consultant, and former co-partner of Kelley in the Olympic firm from April 1956, to February 1958, testified he and Kelley were familiar with assembling and distribution rates; that they had examined some co-operative associations' manuals, and had discussed the possibility of forming such an association between themselves and also with defendant Iverson. One of the consideration in these discussions with Kelley was the possibility that Olympic might perform the managerial and operational services in connection therewith and thereby obtain some additional revenues for the partnership. The witness stated no steps to this end were ever undertaken by him or Kelley.

Witness Stadum, a commerce clerk for the Chicago, Milwaukee, St. Paul & Pacific Railroad in Seattle, was employed by Olympic for approximately 3 weeks in April 1962; that his duties consisted in preparing rate statements on incoming freight bills sent to Pacific's consignee members in Seattle; that the rates, including the pickup

and delivery factors, plus an amount added thereto, were constructed to apply on a list of commodities of certain firms covering movements of freight from origin points to Seattle. These rate computations, based on the carload rates published in the transcontinental freight tariff, were then typed on freight bills showing the name of the Association.

Witness Anderson, a salesman for the Jafco, Inc., discount house, was employed by Olympic from December 1962, to June 1963. Prior thereto he was a salesman for Pioneer Carload Company, a regulated freight forwarder. Most of his time while employed with Olympic was devoted traveling to Spokane, Portland, and Vancouver in connection with Olympic's accounts. During these trips he contacted some firms with the view of becoming members of Pacific. Some of these contacts were solicited on his own initiative and included companies whose freight was being handled by his former freight forwarder employer. When he and Kelley traveled together to Vancouver in connection with Olympic's accounts, he called on firms contemplating the formation of a co-operative association on shipments moving from eastern origins into Vancouver. The record shows that the Van-Can Co-Operative Shippers organization in Vancouver was incorporated under the Co-Operative Associations Act in Vancouver, Province of British Columbia, Canada, on August 20, 1963. Kelley is also managing agent of this shippers' association. A few Vancouver shippers were signed by the witness as members of Van-Can.

The witness signed between 15 and 18 firms as members of Pacific, including Sleep Aire Mattress Company, Seattle, which had been using the freight forwarder services of his former employer on shipments moving from the southeast to Seattle. In connection with his solicitation for Pacific the witness would, upon request, advise prospective members of the Association's rates on particular commodities from certain origin points to destination. The

rate quotations submitted in these instances were obtained from Fesenmaire, an employee of Olympic. The witness agreed, on cross-examination, that the Association was desirous of obtaining sufficient business from the southeast to warrant frequent movements for members shipping out of that area. He stated that he was not aware when soliciting members for Pacific that the additional traffic moving in the service of Pacific would result in a benefit of 33 cents per hundred pounds to Kelley.

Witness Fesenmaier, one of the defendants named herein, presently employed as a rate clerk for International Forwarding Company, was employed by Olympic from August 1960, to May 1964. Employment with Olympic began approximately 1 year prior to incorporation of Pacific. Beginning in June 1961, he also performed services, without compensation, for Pacific, handling rate matters and normal day-to-day operations of that Association which had approximately 100 members at that time. Most of his work-week was devoted to Association matters after it commenced operations on July 17, 1961. He was elected secretary of Pacific at the trustees' meeting on September 18, 1962, receiving no compensation therefor, and resigned as secretary of the Association and as an employee of Olympic in May 1964. His duties with Olympic consisted in picking up and auditing clients' freight bills and filing overcharge claims of Olympic's accounts with the carriers.

His services for Pacific included the computation of the total charges based on rail carload rates reflected on the freight bills sent to members covering movements of their freight. The total charges, as computed, representing the single-factor rate on a member's shipment, were constructed by taking the carload line-haul rate and adding thereto amounts paid by the Association for loading, unloading, delivery, and insurance, and an amount to cover the Association's overhead expenses, including, for example, costs incurred in providing rooms, legal and accounting expenses.

If a member had a 60,000 pound carload shipment, Chicago to Seattle, he would determine, and apply, the lowest applicable carload rate, and add thereto the amount per 100 pounds paid to the consolidator at Chicago for loading the car, plus the unloading and delivery charges based on 100 pounds paid to the cartage carrier at destination. Members are advised in advance what the approximate charges will be for moving their particular commodities in the service of the Association from origin to destination. Members are assessed the total charges as thus computed which were paid from the Association's bank account. Based on the cost figures used by this witness in constructing rates for members, he stated that no amount was added to the total charges to reflect any profit for the Association. The cost sheets prepared by this witness on certain commodities moving from eastern and southeastern origins to Seattle, distributed to members, show what the costs would be if handled via the Association compared with those which the members were then paying. Where no savings would result by using the Association's services, the member is advised to route that particular shipment via its present carrier, or by any other mode. In most cases, the Association's costs are less than freight forwarder costs. It appears that some shipments did move via the Association when its costs were higher, notwithstanding the latter's advice to the member.

The Association's service to members in connection with the movement of freight is to advise them of the facilities available and the types of shipments that can be handled through the Association. Members are furnished, on request, the names of motor carriers publishing the best available pickup assembling and distribution rates. Unlike Philadelphia, which has movements from more suburban areas, most of the shipments from the New York area do not require assembling and distribution service since local pickups are performed at the suppliers' requests or delivered in their own trucks. While routing instructions are furnished suppliers by the member-consignees, they

are not bound thereby. For example, if a member had a shipment from Detroit, Mich., to Seattle, consigned to Pacific, he could, if he wished, instruct his supplier in Detroit to have the shipment picked up by a particular motor carrier and delivered to Pacific's consolidating agent's terminal in Chicago, (Chicago Terminal Clearance), for loading and movement beyond by rail. If the supplier delivered the freight in its own trucks to the agent's terminal, there would, of course, be no pickup charge. On the other hand, if it were not delivered by the supplier, the originating carrier would either bill Pacific direct for payment of its charges or present its bill to the loading agent for forwarding to Pacific for payment. A similar situation obtains where a shipment originating in Chicago is picked up by the consolidation agent. In this latter instance, the members are so advised. When received at the agent's terminal in Chicago, the freight is consolidated and moved either as a single carload shipment or as part of a battery of cars. The rail bill of lading shows the consolidated agent as consignor. When received in Seattle, the freight is unloaded and delivered by local carriers approved by the board. The total charges billed the member by Pacific for handling the aforesaid shipment from Detroit to Seattle, include the originating carrier's pickup charges for moving it from Detroit to the agent's terminal in Chicago, which were advanced by the Association, and his proportion of the rail and agent's charges, and the Seattle distribution agent's charges for unloading and delivering the shipment to the member-consignee. The only charge shown as a separate item on the freight bill sent to the member would be the advance paid by the Association to the pickup carrier for moving the member's freight from Detroit to the consolidation agent in Chicago. A similar separate item would also be shown where a shipment originating in Chicago is picked up by the loading agent. The witness stated that freight of nonmembers is refused by the consolidating agents. If this shipment were destined to an area beyond Seattle, Pacific would

tender it to a carrier serving that area. The delivering carrier's charges in these circumstances would likewise be shown separately on the freight bill sent to the member. The method of payment of the inbound carrier's charges for delivering freight to the consolidating agents' terminals in New York and Philadelphia, is different than in the case of shipments delivered to the agent's terminal in Chicago. The consolidators in New York and Philadelphia (defendant Pennant in both cities) pay the inbound carrier direct and in turn bill the Association. This advance payment is shown by the consolidators, in addition to their own charges, when billing the Association. Pacific's operations are handled entirely by Olympic.

Freight consigned to Pacific from Chicago to Seattle, is coloaded as a single rail shipment in the same car with shipments destined to the Seattle members of Industrial Shippers Association (Industrial), Chicago. In some cases, Industrial is shown as the consignee on the rail bill of lading, while Pacific is shown as the consignee in other instances. In these circumstances, Industrial's shipments are handled on arrival at Seattle by its own transfer company. Pacific also coloads freight for its members in the same car with freight of Van-Can Co-Operative Shippers, as part of a single rail shipment, showing Pacific as consignee. Fesenmaier, when employed by Olympic, also prepared rating and cost quotations for, and sent bills to, the members of Van-Can on shipments moving to Vancouver, British Columbia. When coloading with Pacific, Van-Can paid its own proportion of the rail charges direct to the railroad, which were prorated on the basis of the weight in the car. When coloading with Industrial, Pacific paid the rail charges and then billed Industrial for its proportion thereof. The purpose of coloading with these two organizations is to meet the minimum carload weight requirements and thereby effect savings to the Association, in the absence of which Pacific's rail charges would be higher. The record shows that Pacific also coloads with Automotive Shippers Association.

At the time Pacific commenced operations, its eastern consolidated loading origins were at New York, Philadelphia, Chicago, Charlotte, and Atlanta, its destination points being Seattle, Spokane, Portland, and Tacoma. Pacific also arranges for the transportation of members' shipments by motor carriers to destination points beyond those just mentioned.

Pennant's [13] operations as shipping agent for Pacific are to receive the freight of its members, issue a receipt therefor, perform consolidation thereof, and tender the shipment to the railroad for delivery to the Association, for which services it receives a consolidation charge. No financial arrangements exist between Olympic and Pennant, or Banner. The officers and trustees of the Association have never received any compensation for the time spent by them on Association matters.

Pacific's service involve only westbound movements from eastern origins, and include the handling of prepaid and collect shipments. On collect shipments by a nonmember consignor, the member consignee pays the freight charges; on prepaid shipments by a nonmember consignor, the charges are paid by the consignor. Shipments prepaid by a nonmember consignor are billed by the Association based on uniform rates published by freight forwarders operating from eastern origins to the west coast. In these latter instances, the costs are computed on the basis of collect shipments, and the difference refunded to the member. Members are responsible for the payment of prepaid shipments if the consignor fails to pay.

During the period Fesenmaier was secretary of the Association, he obtained between 15 and 20 members for the Association, some of whom were referred to him by sources other than by personal solicitation. Expenses in-

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[13] The record shows that Pennant, which performs consolidation services in New York and Philadelphia, is owned by Banner Consolidating, Inc.

curred by him on behalf of the Association, such as out of town trips, were presented to and approved by the board of trustees. To the best of his knowledge, each member paid his initiation fee of $100. He was also authorized to sign checks on behalf of the Association, which subsequently required the additional signature of either holder, treasurer, or Kelley, as managing agent. In some instances, the Association absorbed the freight charges on movements beyond Seattle, for example, to Spokane, when the freight in the car was insufficient to warrant a stop-off at Spokane and it was cheaper to bring the car direct to Seattle and back-haul the freight rather than to make a stop at Spokane.

Defendant Comer & Hanby Federated Wholesalers, Inc., a wholesale drug and sundry distributing firm in Seattle, a member of the Association since its inception, handles nationally advertised merchandise shipped to it from various parts of the United States. Most of its shipments handled by the Association originate in the greater New York area, New Jersey, and Chicago. A few of its shipments originate in Philadelphia.

The president testified that this company was denied membership in the Washington Oregon Shippers Co-Operative Association in 1953, and joined Pacific to be on a parity in freight savings with competitors who are members of a similar association. This witness first learned about the formation of this Association from a former employee of a car loading company, and attended two of its initial meetings; he now attends meetings whenever possible, otherwise he submits his proxies, and receives copies of the minutes. This company paid the $100 initiation fee, and deposited a certain sum to protect its incoming freight, and furnished a surety bond, which he understands is to protect the Association in the event it is unable to collect the freight charges. While he had no personal knowledge whether or not the Association maintained a bank account, he assumed that it did.

This company also utilizes freight forwarder services, but finds it cheaper to ship through the Association. On shipments moving from Chicago to Seattle, he instructs his supplier to move his freight to the consolidation agent's terminal. If he requires a routing guide on shipments handled through the Association, it is furnished to him upon request, but does not specify the incoming carrier to handle his shipments from the supplier to the loading agent's terminal, utilizing the carrier selected by the manufacturer. Freight arriving in Seattle is delivered by a local carrier which he assumes is under contract with the Association. The Association's services are not used by this company on prepaid shipments moving from New York to his door in Seattle.

Defendant MacKenzie is the owner and president of the May Hardware Company, Portland, a wholesale distributor of hardware and sporting goods. This company has been a member of the Association since its inception, paid its initiation fee and contributed to the working capital fund. The witness was one of the incorporators of the Association, a member of the organization committee, and one of the initial trustees of the Association, an office he still holds. He attended at least two organization meetings in Seattle, the transportation expenses in connection with which were paid by his company. He attended three trustees' meetings on June 6, 1961, June 29, 1962, and February 14, 1963; attended a membership meeting on February 14, 1963, and a Portland membership meeting on March 7, 1963, held at the Multnomah Athletic Club, the rental for the use of which being paid by those attending this meeting. He points out that the Association's accountant reported on the Association's financial condition at the trustees' meeting of June 29, 1962. The witness was uncertain whether or not it was Kelley who first contached him about an organization to be formed. Kelley's firm has been auditing the freight bills of this company since 1962 or 1963.

The witness asserts his company does not assume any financial responsibility for shipments of other members. Most of the freight shipped for this company originates in the east and is handled primarily by regulated freight forwarders; shipments from California come prepaid and move via regulated motor carriers, the manufacturer selecting its own carriers. On shipments handled through the Association originating in Chicago, the supplier is furnished stickers indicating the consolidation point to which the freight is to be delivered for transshipment. The Association, to his knowledge, has never furnished cost comparison statements to his company reflecting the rates via freight forwarders vis-a-vis the Association's costs, and that the Association, to his knowledge, has never earned any profit. This company had a surety bond at one time, but not at the present time because it has not used the Association's services for more than a year or two due to a teamsters' strike in his area lasting about 18 months. The witness points out that the Association constructs its charges by assembling sufficient weight in the car to obtain the carload rate, rather than to ship on a less-than-carload basis. These rates are prepared by Kelley for the Association's members.

None of the principal firms with which this company competes is a member of this Association, although many of its competitors are members of the Washington Oregon Shippers Co-Operative Association and similar organizations.

Witness Snyder, doing buiness as Jerry Snyder Company, Seattle, a wholesale distributor and selling agent of rugs and carpets, has been a member of the Association approximately 3 years. He learned about the Association from a person, whose name he could not recall, who showed him freight rate quotations on shipments of rugs and carpets, based on 100 pounds, from his origin points which would result in savings by shipping his merchandise through the Association compared with those he was

then paying regulated freight forwarders. Since most of the merchandise handled by this witness is shipped from mills in Dalton and Calhoun, Ga., he has not utilized the Association's services since it discontinued operations from the southeastern area in January 1964. If the Association resumed operations from that region, he would use its services. He attended only one membership meeting of the Association, submitting proxies for other meetings; paid the initiation fee, and contributed $100 to the working capital fund, but has not carried a surety bond.

The witness conducts his business from an office as distinguished from a store, where his merchandise is on display, and maintains a warehouse for the storage of this merchandise. When using the Association's services, shipments were delivered either to his warehouse or direct to his retail store customers, as the case might be. In these circumstances, the supplier was furnished routing instructions indicating the consolidation point in Atlanta to which shipments were to be delivered. The cartage company transporting shipments to the loading point in Atlanta was selected by the mill. Most of the shipments handled through the Association were on a freight collect basis, although a few shipments moved prepaid at the customers' requests. In these latter instances, the Association would bill the witness' customer, collect the freight charges, and refund to the witness the difference between the freight forwarder rate and the Association's charge. An exhibit shows he received a check from Pacific in April 1962, for $255.28 representing refunds on several shipments which moved on a prepaid basis.

The witness contends he was not responsible for the transportation charges of other members whose shipments were handled through the Association, nor did he assume any of the financial risks of the Association. While he has not received financial reports of the Association's operations, and has never requested such information, he does receive copies of the minutes of the trustees' meetings.

Puget Sound Sheet Metal Company, Seattle, a metal fabricator, has been a member of Pacific since its inception, but is not named among the defendants herein. The president of this company was subpoened by the Bureau and testified that Kelley's firm has been auditing its freight bills for many years, and that Kelley, from whom he first learned about the Association, is also retained as its traffic consultant, all of which periods predate formation of the Association.

Freight handled via the Association for this company, consisting chiefly of special steel items, such as plated steel heads and wheels, originates chiefly from Chicago, although occasional shipments have moved from Philadelphia. Its shipments move on a collect basis and range in weight from a few pounds to 10,000 pounds. None of its shipments handled through the Association moves on a prepaid basis. Suppliers are advised either orally, or follow instructions on the bill of lading, the consolidation point to which its freight is to be delivered for transshipment to Seattle. Carload shipments originating at mills located in the west do not involve Pacific's services. This company also utilizes freight forwarder services.

Kelley as traffic consultant for this firm, the witness states, being familiar with the nature of the articles used by this company, advised him that savings in rates could be realized on his shipments when moving on a consolidated carload basis, and recommended joining the Association. This member posted a surety bond to assure payments of its own freight bills, its liability being limited to the payment of its own freight charges. It also paid the required initiation fee and advanced $100 towards the Association's working capital fund. Additionally, it responded to the Association's request made on all members to make a voluntary contribution to the defense fund to defray the legal expenses to be incurred in defending the Association's activities arising out of the complaint filed in this proceeding.

The witness attended some of Pacific's initial meetings and one or two membership meetings, and was active in the formative stages thereof; that Kelley never presided at any of these meetings, but did represent his company as traffic consultant at the meeting of April 19, 1961, due to his absence. When unable to attend membership meetings, the witness submitted proxies. Approximately 40 or 50 members were present at the last meeting attended by this witness.

The witness points out that Kelley on more than one occasion had recommended that his company use a service other than the Association in shipping its freight because of the lower costs which would result therefrom.

Chain Gear, Inc., Seattle, which represents various eastern manufacturers of power transmission machinery, is a former member of the Association, having joined on April 21, 1961, and apparently withdrawing therefrom on October 24, 1963. The Association's services had not been used by it for more than a year prior to the latter date. This company was a tenant in the same building as Olympic, which audited its freight bills. The purposes of the proposed co-operative association were broached by Kelley with the view that this company might be interested in obtaining more favorable freight rates than it was then paying on its shipments.

This company, as a member of the Association, took no active part in any of its affairs; never exercised its right to vote; and was not represented at any of its meetings either before or after incorporation. It paid the initiation fee and advanced $100 to the working capital fund, but posted no surety bond. The witness for this company; (employment status not indicated), subpoened by the Bureau, was unable to state whether or not his company, when a member, was expected to assume any liability for the payment of freight charges of other members in the event they failed to pay. No request has been made as yet on the Association to refund the advance made to working capital.

Shipments handled via the Association for this company, moving either direct to it or its customers, originated in Chicago and Racine, Wis., and were delivered on a collect basis at Seattle, Tacoma, and Spokane. Bills covering freight charges on these shipments were submitted to it by Pacific for payment. This company uses freight forwarder services regularly. The witness concedes that his company was at no time close to the workings of the Association; that he did not attend any of its meetings, although he received notices thereof and proxies, and could have attended if he desired; that his failure to do so was due to the fact that he was too busy. Due to his inactive participation in the Association's affairs, the witness appears to have very little knowledge of its operations, except to instruct suppliers to ship via the Association. The witness could not say whether or not his company ever formally resigned from this Association.

The reason for this company's apparent withdrawal from the Association was motivated by the filing of the complaint in this proceeding. By letter dated October 8, 1963, it advised its suppliers not to make any shipments either to it or its customers via the Association under any circumstances until further notice. Notwithstanding this admonition, one shipment was inadvertently received. The witness conceded on cross-examination he felt that his company would still be a member of the Association if the compaint herein had not been filed; that it did not wish to become involved in any legal entanglements.

Witness Porter, subpoened by the Bureau, is an associate of Pacific Traffic Bureau, Seattle, a traffic consulting firm. This witness was employed by Olympic, from January 1957, to May 1961, a portion of which time Olympic was operated on a partnership basis by Kelley and Risser. His duties involved auditing of freight bills, handling sales, performing general office work, and acting as a traffic consultant.

This witness testified that he, Kelley, and Risser, had discussed from time to time the need of a shippers' association; that one of the considerations in the formation thereof was the possibility of additional income to Olympic. During the formative stages of the proposed organization, he contacted between 25 and 30 potential members, including some customers of a freight forwarding company with which he had been previously employed, exhibiting to them rate schedules reflecting comparisons of costs on shipments they were then paying vis-a-vis those on shipments moving via the Association. Subsequent to dissolution of the aforesaid partnership, the witness expressed the opinion that "it was paramount in Mr. Kelley's mind to form a shippers' cooperative, which ultimately became Pacific Progress Shippers." The costs incurred incident to the establishment of the Association, such as those assumed on trips in obtaining members, preparation of pertinent literature, et cetera, were initially borne by Kelley, for which he would be reimbursed after its incorporation.

The witness had no personal knowledge whether or not Kelley, Risser, or Fesenmaier, was approached by Karl Iverson of Weisfield's, Inc., a client of Olympic, or by any other shipper with the view of forming, or helping to form, a cooperative association. He agreed that such an association would result in freight rate savings to some of Olympic's clients, but not all, who became members thereof. He conceded on cross-examination that he, Kelley, and Fesenmaier, being freight rate experts, were the logical persons to discuss rate matters at the initial meeting of November 10, 1960.

A written agreement, dated February 1961, executed between this witness, when employed by Olympic, and Kelley, doing business as Olympic, states that Olympic's customer accounts are highly confidential and the method of handling same is subject to possible solicitation by former employees thereof. In consideration of his continued

employment and mutually agreeable salary for the indefinite period, the witness agreed that upon the termination of said employment, for any reason whatsoever, he would not, for a period of 3 years, either directly or indirectly, solicit, contact, or in any manner compete, with Olympic on any customer accounts held, worked on, or solicited by Olympic during the 2 years preceding termination of his employment, either as an individual on his own account, a partner, employee, agent or salesman for any person, or as an officer, director, or stockholder of a corporation, or otherwise. The record shows that the witness was advised by letter from Kelley's counsel, dated January 31, 1962, that he was violating the provisions of said agreement, and admonished that any further violations thereof would result in the institution of appropriate court action to enjoin the breach thereof and the recovery of any damages occasioned thereby.

Witness Charlesworth, Seattle, subpoened by the Bureau, is a former freight solicitor of a freight forwarding company, and was employed by Olympic for a period of approximately 1 year, 1961-62. His primary duties as an employee of the latter company consisted in picking up and delivering freight bills. Additionally, on his own initiative when delivering freight bills, as well as on other occasions when so instructed, he would discuss with potential members the possibility of joining the Association. In these efforts, he contacted between 30 and 50 prospective members, approximately 15 of whom he signed subject to approval of the board of trustees; some of his contacts were personal friends, some had been contacted previously before his employment with Olympic, while others were more or less follow-ups who had expressed an interest in the Association.

Louis Blumenthal, sole proprietor of Herman & Blumenthal Company, Seattle, a wholesale dealer in men's, women's, and children's wearing apparel, serving customers throughout the State of Washington, and parts of

Idaho, Oregon, and Alaska, subpoened as a witness by the Bureau, testified his company joined the Association on August 28, 1961. He was uncertain whether the invitation to join was extended to him by letter or through personal contact with Fesenmaier, whom he knows.

He learned that another Seattle firm was moving its freight via the Washington-Oregon Shippers Co-Operative Association, and joined Pacific to effectuate similar freight savings on his own traffic originating from the south. This company has not used the Association's services for at least a year and a half. Approximately 25 percent of his shipments orignates from the southern States; he also receives some shipments on infrequent occasions from New York. Discontinuance of services by the Association from the southern area has had an impact on his interest in the Association, and he is now using freight forwarder services.

The initiation fee of $100 was paid by this company, but the witness was uncertain about posting a surety bond, or advancing any money towards working capital. There appears to be a conflict in the record insofar as a payment was made by this company to the capital fund. The statement attached to the balance sheet which lists memberships and amounts paid to working capital for the year ended December 31, 1962, prepared by the Association's certified public accounting firm, and introduced as an exhibit, shows that this company did make an advance of $100 to the working capital fund. Moreover, the record shows that during a discussion between this witness, his clerk, and the Bureau's investigator, the latter admits that the clerk stated that such an advance had been paid. While this witness never attended or voted at any of the Association's membership meetings, although notices thereof and copies of the minutes have been received, he conceded on cross-examination that his inactive participation in the affairs of the Association was of his own choice. As a member thereof, he does not feel he is responsible for any freight charges but his own.

Sahlberg Equipment, Inc., Seattle, is engaged in construction of machinery and heavy equipment and serves customers in the State of Washington. Most of its smaller shipments are handled through the Association and weigh between 300 and 500 pounds and originate at Cedar Rapids and Des Moines, Iowa, Milwaukee, Wis., and Chicago. The vice president of this company was subpoened as a witness by the Bureau and testified that it withdrew its membership by letter dated March 10, 1962, and deducted the initiation fee of $100 from the check reflecting the amount owed to the Association for freight charges.

The initial contact with this witness was made by witness Charlesworth, a former employee of Olympic, who explained how freight savings could be effected by pooling its shipments with other freight moving out of Chicago via the Association. The witness was given a mimeographed statement which outlined the purposes and operations of the Association, and cited examples of approximate savings in freight charges on certain commodities shipped through the Association. Other pertinent data, including routing instructions, were also furnished.

This company's reason for withdrawal was due to serious delays experienced in arrival of its freight at destination; that it would not afford to wait a week or 10 days while the Association accumulated a carload shipment out of Chicago; that its service was unsatisfactory compared with the expeditious movements of shipments handled in less-than-carload lots and that the time element in receiving its shipments is an important factor in servicing customers. It is now utilizing a certificated freight forwarder, whose service, in the opinion of the witness, with the exception of rates, are similar to those performed by the Association. He agrees that when shipping via a freight forwarder he is not required to furnish the supplier with routing instructions, and never advised of the forwarder's receiving terminals; that there is no benefit of carload rates from the freight forwarder when ship-

ments are consolidated with freight of other shippers, all of which are part of the services rendered by the Association.

It appears that no surety bond was posted by this company; that he assumed no liability for the payment of freight charges other than his own, and would not have paid any other charges if called upon by the Association. The witness agreed, on cross-examination, he had a right to attend and participate in the discussions at membership meetings, but that he could not spare the time.

Witness Thomas, special agent of the Commission's Bureau, conducted an investigation of Pacific in March 1963, and March 1965, consisting of an examination of Pacific's files kept in Kelley's office, and interviewing potential witnesses preparatory to these hearings. He also examined the corporate records of the Association kept in the custody of its counsel.

An exhibit introduced through this witness, representative of a member's file, consisted of a copy of the application for membership in the Association submitted by Cemac, Inc., Spokane and Seattle, stating that the initiation fee of $100 is payable after acceptance of the application; a letter designating its representative and an alternate; a letter signed by Karl Iverson, then president, advising that the application had been accepted by the Organization Committee; Cemac's letter transmitting check for $100; routing and rate sheets prepared by the Association on particular commodities shipped for this member, and a copy of Cemac's surety bond.

Article XV of the By-Laws requires that each member file a surety bond of $1,000 "to guarantee the payment of any or all freight charges due the corporation from the member." Although the individual file on each member was not examined by this witness, he estimates that of those inspected approximately 50 percent had not posted bonds. The record does not indicate how many member files were examined by this witness for this purpose.

Testimony with respect to the person or persons who conceived the idea of establishing this shippers association is conflicting. This witness testified that Kelley informed him that some of his clients were disturbed because they were barred from membership in the Washington-Oregon Shippers Co-Operative Association; that he saw the need of another organization of this kind in Seattle, and was approached by some of his Olympic clients, including defendant Iverson of Weisfield's, Inc., to consider forming one so that freight savings might be effected on their shipments, and that he, (Kelley), had been thinking about this matter since 1957. Kelley, in his rebuttal testimony, denies telling this witness the idea of forming this Association originated with him. Defendant Iverson testified it was he, not Kelley, who conceived this plan, and that he had discussed this possibility with Kelley on numerous occasions. The Bureau's witness, on cross-examination, agreed that some of the board members had told him they had mentioned this matter to Kelley. In his reubuttal testimony on redirect, this witness agrees that defendant Iverson, when interviewed, was emphatic that it was he who conceived the idea of forming the subject Association.

A lease was executed between the Association and the Great Northern Railway Company on February 12, 1962, for dock and office space based on a monthly rental of $210, paid from the working capital account. The record indicates that Kelley's proration of this rental was $150 per month. The office space was occupied by Olympic and the dock space utilized by the Association. The latter space was used also by Industrial Shippers Association, Chicago, for which it paid 2-cents per 100 pounds on freight coloaded with Pacific's shipments out of Chicago. The Association subsequently transferred its unloading and break-bulk operations to the Northern Pacific Railroad Company's freight house. There is no dispute that Pacific and Industrial coload out of Chicago, and use the same consolidation agent in that city, viz, Chicago Terminal Clearance Company. Prior to this lease, Pacific's

break-bulk operations were handled from the railroad's team track. In the opinion of the witness, coloading between Pacific and Industrial is necessary in order to meet the minimum weights and thereby obtain the benefits of the low carload rates, and avoid paying for air in the batteries of cars transporting their respective shipments.

Shortly after incorporation, the Association established a checking account on June 15, 1961, depositing therein advances made by members to the working capital fund. This account was established for the purpose of meeting the Association's normal operating expenses, such as freight bills, advances, stops, and transportation charges. The initiation fees were deposited in a separate account, under the name of the prior Association. The reason for this, as explained to this witness by witness Porter, a former employee of Olympic, was that Olympic was using its own money in organizing the Association and would be reimbursed later from this fund. This account was subsequently closed out some time after the name of the Association was changed and it became a corporation, and these funds deposited in another account separate from the operating account. In this connection, the Bureau introduced a multiple exhibit consisting of a series of bank statements and cancelled checks drawn on this account held in the name of the predecessor Association. The apparent purpose of this exhibit is to show that the prior Association was still in being to the extent of this bank account, whereas the subject Association had already been incorporated. The checks drawn on this account were signed by Kelley. The record does not indicate the opening date of this account, but it obviously was prior to incorporation of the Association, since the first entry on this multiple exhibit shows a balance of $3,500 brought forward on April 28, 1961, and appears to have been closed out in the early part of 1963.

In February 1962, the Association opened a savings account in which $10,000 was deposited, accruing interest

thereon in the amount of $300. The witness contends this is one instance in which he found a profit by the Association. The reason for this account, as explained to him by Kelley, was that the railroad was slow in billing the Association and that the latter had sufficient working capital, and that in view of this situation, it was decided to establish this account. Subsequently, $5,000 thereof was withdrawn and placed in the Association's regular checking account to be used in paying the Association's regular bills. In his letter to the trustees seeking approval or disapproval in establishing this account, Kelley states that "The above information regarding the excess funds is extremely confidential and it would be detrimental to the Association if this should become general knowledge." This letter also mentioned that the Association, as of January 1, 1962, had an excess of $45,000 in its checking account due to the slowness of the railroads in submitting bills for rail charges, and that he was advised by the Association's attorney that he saw no legal reason for not taking advantage of this situation and obtaining the benefit of any interest accruing thereon.

In an effort to show that the Association is processing loss and damage claims for members contrary to article XIII of the By-Laws, an exhibit submitted by the Bureau reflects the Association's participation in handling a loss and damage claim for Associated Dime Stores, Seattle, one of its members. This exhibit shows that the Association's letter to the Great Northern Railway Company, transmitting a copy of the freight bill covering the member's shipment and a form sheet filled out and signed by the member describing the details of the shipment, refers to the claim filed by the member with this carrier, and requests that the railroad handle this matter to a conclusion and send the check therefor to the claimant member. Article XIII of the By-Laws states in part that "The corporation * * * shall furnish the members with all information and documents necessary to prosecute the claim and shall assist members in the collection of the claim." It cannot be concluded from the example cited that the as-

sistance rendered by the Association to its claimant member is tantamount to the processing of a loss and damage claim in contravention of article XIII of the By-Laws. Three similar situations involving alleged overcharge claims are also cited. The evidence as to these situations consists of letters exchanged between the members and Pacific. In both of these circumstances, the witness admits, on cross-examination, that the Association did not pay any of these claims and acted only as an intermediary.

The record shows that various expenses were incurred by Kelley, Porter, and Fesenmaier traveling to and from Portland, Spokane, and other points, on behalf of the Association during the formative stages of this organization in 1961. Some of these expenses were incurred by Kelley on trips made on behalf of the Association to Chicago, New York, Atlanta, and Charlotte.

Based on an exhibit reflecting recapitulation of Pacific's cost sheets on batteries of cars handled out of New York, Chicago, Charlotte, and Atlanta, for the year 1962, numerous instances are shown where the volume of freight in these batteries did not meet the minimum carload weight requirements, and resulted in the Association's failure to recover its entire costs. For example, on a battery movement out of New York weighing 39,578 pounds, the tariff charges amounted to $2,521.70 as against a cost of $2,415.02 collected from the member, or an Association loss of $106.68. In these cases, the witness was told by Kelley that these losses occurred during the early period of the Association's operations, and that because of this situation, the members were assessed the lawful tariff rate for a period of 3 months in order to recoup some of these losses. In instances where a profit accrued, as reflected on this exhibit, it is indicated that the carload shipment either exceeded the minimum weight or contained higher rated freight. The witness generally agrees that it is not always possible for an association to come out exactly even on costs which have been established for members.

The Association, for a brief period of time, sought to obtain members in Vancouver, British Columbia, and succeeded in signing one company in that city which subsequently cancelled its membership and the monies paid by it refunded.

The trustees at their meeting of June 29, 1962, ratified action taken by its managing agent that the Association, for a period of 3 months, would charge its members freight forwarder rates, but that its agent would have authority to adjust rates in hardship cases and in cases in which a bid had been submitted based upon freight rates available through the Association. In explanation thereof, Kelley told this witness that because the Association was short of working capital at that time, it was decided to assess the freight forwarder tariff rates for 3 months to enhance the working capital fund. The hardship cases referred to applied to movements out of the southeast, an area from which it was trying to increase its tonnage. In these cases, some of the shipments from this region were allowed to move at the Association's rate.

Pennant, one of the principal defendants, was organized in 1950, as a consolidating shippers agency, handling freight in consolidated carload lots for shippers' associations, and others, from its own receiving terminals in New York and Philadelphia. It performs these services in New York as Pennant, and in Philadelphia as Banner Consolidating, Inc., its operations being similar in both cities. Both agencies are subsidiaries of Paramount Freight Handling, Inc., which engages in similar freight consolidation services. Pennant's assistant manager at New York testified that it has been performing these services for Pacific since July 1961. Shipments consigned to Pacific's members are delivered to these terminals by the shipper's or manufacturer's motor carriers; those originating beyond the States of New York and Pennsylvania are transported to these two consolidation points by regulated common carriers. This company does not, in either

instance, provide carrier arrangements for service performed for Pacific, its other shipping associations, or for other accounts.

Merchandise tendered for movement on a consolidated carload basis is receipted, manifested, checked against the membership list furnished by Pacific, and then loaded into box cars. Copies of the manifests are made up from the shipping orders, bills of lading, and the receipts exchanged with the originating motor carriers. The bill of lading showing Pennant as agent for Pacific is prepared by it and a copy executed by the rail carrier, evidencing receipt of the freight turned over to it reflecting the carload movement. The manifest shows the names of the shipper and consignee, description and weight of the commodity taken from the originating carrier's freight bill, the number of packages, car number in the battery, date, and such charges, if any, advanced thereon by this agent. A copy of this manifest is sent to the Association soon after the car has been loaded. Pennant, as consignor, executes the nonrecourse clause on collect shipments, stipulated on the bill of lading, as provided in the contract terms and conditions, section 7, of the Uniform Straight Bill of Lading, relieving it from liability for all freight and other lawful charges. When changes occur in Pacific's membership list, such as additions and deletions, it is advised by letter to correct its list accordingly, in lieu of receiving new lists from time to time as changes occur therein. This membership list, including any changes, is kept by the receiving clerks in its New York and Philadelphia terminals.

Freight delivered to these terminals in trucks other than those of the supplier, the charges therefor, shown on the freight bill, are advanced by this company. The document reflecting these advances, together with the manifest, is shown as a separate item on the invoice submitted to Pacific covering the consolidation agent's charges for its service for the member or members. On shipments delivered to its terminals at the shipper's cost, the descrip-

tion of the commodity, number of pieces, weight, and names of the shipper and consignee, are taken from the document received from the driver who, in turn, is given a corresponding receipt by the agent. This company does not prepay the railroad line-haul freight charges, which are obligations of the consignees, but sends all shipments collect.

The receiving and consolidation services performed by Pennant for the Association are pursuant to a written contract executed between these parties in July 1961, which is terminable on 30 days' notice at the option of either party. The rate charged for services at both terminals is 16-cents [14] per 100 pounds, subject to a minimum charge of 15-cents per shipment. Pennant, under its contract with Pacific, assumes responsibility for loss or damage to the freight only when it is in its physical possession, which ceases upon execution of the bill of lading by the rail carrier. The witness states that his company has never had to pay a loss or damage claim to Pacific.

Neither this company nor any one connected with it, the witness avers, has any financial relationship with Pacific or Olympic, or with Kelley as representative thereof, other than this contractual arrangement, and that it receives no compensation other than as specified in this contract. Charges assessed the Association for the receiving and consolidation services performed by Pennant are the same as those charged other shipper associations for similar services.

The initial contact to utilize Pennant's services as Pacific's consolidation agent in New York and Philadelphia, made by Kelley when he visited New York. Shortly thereafter, Pennant's operating manager conferred with the Association's board of trustees in Seattle, and concluded, based on his experience in investigating similar

[14] The original rate of 15-cents was increased to 16-cents within the last year or two.

association accounts, that it was the kind of association whose operations were exempt from regulation under section 402(c)(1) of the act. Copies of the Association's corporate papers, including its By-Laws, have been furnished to this company.

Pennant coloads Pacific's shipments with those of Van-Can Co-Operative Shippers, which move on a single rail bill of lading. It also has a membership list of the Van-Can members in Vancouver, B. C. Coloadings began after Pennant was advised by letters from Pacific and Van-Can that these two associations had reached a coloading agreement, the letter from Pacific being signed by Kelley. This witness concedes there have been instances in which his company refused to handle shipments for Pacific and other shipping associations on the mistaken belief that the consignees were not members of shipper associations for which it was providing, receiving and consolidation services. The services engaged in by this company as a shippers' agent in consolidating carload shipments are confined to the terminal areas in which such operations are performed.

Defendant Weisfield's, Inc., one of the member pioneers of Pacific, operates 38 retail jewelry stores within the States of Washington, Oregon, California, Idaho, and Montana, approximately 50 percent of these stores being located in Washington; it also operates 8 discount houses, known as Valu-Mart Discount Department Stores, which handle general merchandise, including bolts, nuts, screws, hardware, appliances, cameras, jewelry, linens, housewares, food and clothing.

Defendant Iverson, a vice president of Weisfield's, was the first president of the Association, occupying that office for a little more than 1 year. As vice president of this company in 1960 and 1961, his duties included, among other things, supervision of all transportation matters. These duties are now under the supervision of another employee, although his responsibilities continue to include

service and cost factors relating to transportation matters of this company.

Substantial portions of the merchandise shipped to Weisfield's originate from New York, Philadelphia, and Chicago, destined to its Seattle warehouse for distribution to its several stores. Some shipments from these origins move directly to specific stores. Iverson asserts that practically all of the major department stores competing with his company are members of the Washington-Oregon Shippers Co-Operative Association, by reason of which they are able to effect freight savings ranging from 10 to 25 percent below the freight forwarder rates on shipments originating in the east. These percentage figures are based on conversations between him and the president of the aforesaid cooperative association, and with other business concerns. Since savings on freight charges on shipments moving from eastern origin points are an important factor to his company, he obtained an application on behalf of Weisfield and Valu-Mart to become members of the said cooperative association. Prior to the execution and filing of his application, however, he was informed by the president of that organization that membership therein was closed. Some time thereafter, he discussed with Kelley, at various times, the possibility of forming another cooperative association in the Seattle area, and sought Kelley's assistance in bringing this about, whose firm had been auditing Weisfield's freight accounts for many years. The witness asserts that the idea of forming the subject association was conceived by him, and that Kelley at no time suggested this possibility to him. He conceded on cross-examination, that he had a personal interest in establishing a shippers' association so that his two companies might thereby obtain transportation services at lower costs.

As previously noted, a group of business people, about eight in number, in addition to Kelley, thereupon held an informal initial meeting on November 10, 1960, at the

Four Winds Restaurant in Seattle to consider this possibility in order to serve the needs of the companies represented at that meeting and any other interested parties. Kelley was requested to contact other potential members, since those present at that meeting had neither the time nor the technical knowledge of transportation problems. Similar contacts were made by some of its members. At the Organization Committee meeting of April 19, 1961, Olympic was selected as the traffic consultant and managing company of the proposed Association, since it was necessary to employ the services of a person possessing the experience and knowledge of traffic problems; that the management company would route the members' merchandise, save the Association money, and carry out in general the functions of a traffic department. Kelley's firm was also required to make all arrangements with the loading companies in the east, since the trustees were not familiar with the organizational set up or qualifications of consolidating companies; interest other organizations and consignees to become members, and to follow through on potential members recommended by the Association.

The witness avers that the additional bank account opened in the name of Progressive Shippers Association was changed upon learning that a similar name was used by another shippers' association. The fact that the bank account was not changed until later, the witness attributes to an oversight. The initiation fee of $100 was established as a cushion, or fund, for the payment of expenses which would be incurred in shipping the members' freight, as well as those incurred by Kelley for the Association, and to encourage people to be serious about joining the association.

In explanation of his motion made at the Organizational Committee meeting of April 19, 1961, that the management company be authorized to draw checks on the checking account for services and expenses incurred in performing work for the Association, and to authorize cer-

tain persons in its employ to write checks on the account, submitting expense accounts therefor, the witness states that the Association was aware that trips were necessary for which funds had to be made available. In connection with the managing agent's expenses, the witness states that all bills were submitted to him as president and the board for review, and that he, as president in the early days of the Association, was completely satisfied that they were all incurred by Kelley on behalf of the Association.

The witness is not aware of any one connected with the Association making a profit as distinguished from compensation received for services performed for the Association; that Kelley, the only employee of the Association, is subject to the same policies and regulations set down for an employee of any organization, and that his services can be terminated at any time. The witness points out that Kelley has attended trustee and membership meetings for the purpose of answering questions, but never presided or voted at any of these meetings.

Members are permitted access at any time to the books and records of the Association, which are audited annually by a certified public accounting firm, whose financial reports are submitted to the trustees. No major purchases or any other expenditures, to his knowledge, have ever been made without approval of the trustees.

The banking resolution adopted at the first meeting of the trustees on June 6, 1961, authorized either Holder, as treasurer, or Kelley or Fesenmaier, as agents, to sign checks for the Association, subject to the certified copy of corporate resolutions for signing and endorsing checks issued by the National Bank of Commerce, Seattle. The reason for this, the witness explains, was because the day-to-day operations of the Association at that time required that checks be written on a daily basis.

The articles of incorporation filed on June 9, 1961, reflect the action taken by the trustees at their meeting of June 6, 1961. Trustees' meetings, as distinguished from

membership meetings, are generally held once a month, or more often if necessary, whereas membership meetings are held on an annual basis. The trustees are elected by the members at the annual membership meetings.

The record includes an undated memorandum sent by Kelley to the trustees during the early stages of the Association, seeking approval or disapproval of a proposal to allow new members to enter the Association by paying the cost level in lieu of the freight forwarder rates during the period when the Association was operating at the latter level. The purpose of this proposal, the witness states, was to increase the Association's membership and tonnages so as to provide better services and rates for its members; that a period of time must necessarily elapse when starting a shippers' association before it would be in a position to provide proper services and rates for members. The witness voted against this proposal, however, since it offered to new members an inducement not accorded the then present members. As far as he can recall, Iverson believes this proposal was rejected. Insofar as being liable for the freight charges of other members, the witness stated that Weisfield was responsible only for its own charges.

The financial statement prepared by the Association's certified public accounting firm covering the period June 6, 1961, to December 31, 1961, shows that the Association experienced a net operating loss of $7,300.59. The contract between the Association and Kelley provides, among other things, "that Kelley is entitled to additional compensation for his services to and for the Association during its organizational period." While Kelley has been reimbursed for expenses incurred by him on behalf of the Association, the additional compensation due him for services performed during the organizational period is not reflected in the said financial statement inasmuch as the exact amount, it appears, has not been definitely determined. An item in this financial statement representing

total disbursements of $9,635 includes reimbursement of $4,853 paid to Kelley, as shown in the minutes of the trustees' meeting of June 6, 1961, covering expenses, not services, incurred by him or his staff from November 10, 1961, to April 18, 1961, the balance thereof including some additional legal expenses and filing fees and payments made to the Association's accounting firm. The 35-cents per hundredweight payable to the managing agent as compensation for services to be performed for the Association, as set out in paragraph (2) of the aforesaid contract, was arrived at by mutual agreement between the Association and Kelley. The witness points out that this figure was very close to the amounts paid managing agents of other shipping associations which were considered at that time.

Defendant Deits, current president of Pacific, and a member of Pacific's board of trustees, has been traffic manager of Weisfield during the last 3 years. He was first elected to the office of president at the membership meeting of September 18, 1962, and reelected each year thereafter. Prior to employment with this company, his transportation experience covered a period of 30 years, including 10 years in the motor freight industry, 8 years in public warehousing, 2 years in the barge business, and 10 years in industrial traffic work.

Approximately 25 percent of Weisfield's shipments from New York, Philadelphia, and Chicago, is handled via the Association, including shipments originating beyond the commercial zone in New York City delivered to the consolidation point by motor carriers. Routings in these latter instances to the terminal receiving station are shown on its purchase orders. The inbound freight charges, in these circumstances, are paid by the loading agent and applied against the manifest sent to Pacific which, in turn, bills Weisfield for such charges.

This company utilized Pacific's services to reduce its overall shipping costs. Motor carriers are used, in lieu of Pacific's services, in instances in which it is more eco-

nomical due to shipper locations. Weisfield's shipments generally range between 500 and 1,000 pounds, although it has routed shipments as low as 15 pounds and as high as 20,000 pounds.

While the minutes of the trustees' meeting of September 18, 1962, recommend that a future meeting of the membership be held in Spokane and Portland, no meeting was held in Spokane due to insufficient interest at that time, and only two membership meetings were held in Portland.

The minutes of the trustees' meeting of February 14, 1963, refer to an application for membership filed by one Art Kimball, a factory representative for a New York group which factors for rug mills. This application raised a serious question whether a factory representative not shipping or receiving freight in his own name is eligible for membership in the Association. Consequently, it was moved and seconded that Kimball be advised that his request for membership will require further study, and that his request could not be granted at that time. At the next meeting of the trustees on March 1, 1963, Kimball's application was "declined for the reason that applicant's participation in the handling of freight moving from the mills he represents to the customers to whom sales are made is such that the Association would not legally handle the freight unless either the mill or the consignee were a member of the Association."

After reviewing the minutes of the 14 meetings of the board of trustees, beginning with September 18, 1962, and concluding with March 15, 1965,—at each of which he was present—the witness states that these minutes accurately reflect the action taken by the trustees.

The tentative schedule for holding trustees' meetings is on the first Monday of the month. Prior to this date, trustees are contacted by telephone to ascertain if the date is convenient, and if a sufficient number will attend, the

meeting is fixed for that date; if the number is insufficient a time is then agreed upon convenient to all.

Written notice of membership meetings are sent to the members not less than 10 days before the date of each such meeting, as required by the By-Laws. The witness asserts that every effort is made to hold the annual meeting in September, otherwise an acceptable date is fixed when the Association is able to obtain a facility in which to hold the meeting. Members are requested to submit proxies in the event they are unable to attend in person. Nominations for trustees are made by members from the floor in addition to the Nominating Committee's report submitted by the board of trustees. In this connection, the witness points out that the membership meeting of September 24, 1963, unanimously reelected the trustees on nominations from the floor. The minutes of the membership meeting of September 18, 1962, attended by 20 members in person and 61 by proxies, reflect that Pacific's treasurer, Holder, presided at that meeting in the absence of the president due to illness in his family; that the presiding officer opened the floor for nominations for the office of trustee; that seven of the nine nominees from the floor were elected to serve for the ensuing year or until their successors had qualified. The minutes of the membership meeting of October 23, 1964, show that the board members proposed by the Nominating Committee's report were elected.

The witness avers that the services of Kelley, the Association's legal counsel, and its accounting firm, can be terminated at any time. The purpose of the board meetings, witness states, is to discuss current business conditions, operations, and problems facing the Association. It is further averred that the purpose of the Association is to operate as a nonprofit shippers' association in order to realize lower freight charges on freight shipped for its members. If a board meeting is held during a luncheon period, the Association pays for the luncheon.

Insofar as loss and damage claims are concerned, the witness avers that the Association is protected by insurance if the carrier against which the claim is filed fails to pay. The number of such claims paid by its insurance company, in these circumstances, has been nominal, and that the Association has experienced only one increase in its insurance practice, considered nominal in this type of business. The minutes of the trustees' meeting of February 1, 1965, show that the insurance company's request for an increase of 1 cent was approved.

Distinguishing between the services performed by freight forwarders and shippers' associations, the witness contends that whereas the former arranges for pickup and ultimate delivery, it is the obligation of the latter to have the freight delivered to the appropriate receiving terminal and to be responsible for either the route or the rate of the shipment. In the absence of a complete routing, he feels that a shipment could easily go astray and result in the ultimate delivery by a commercial motor carrier; furthermore, that the shippers' association determines its own policy through its operating manager, who is responsible to the Association, has greater control over its own shipments and, therefore, can demand a service over and above that provided by common carriers.

As far as the services performed by and the compensation paid to the Association's managing company are concerned, the operating statements submitted by and the monies paid to the latter are reviewed periodically. This procedure is followed also with respect to the amounts paid to the Association's consolidators in the various cities. Operating agreements made with its loading agents at points of origin, as well as its general agent in Seattle, are approved by the trustees insofar as the monies paid for the services rendered by these agents are concerned. The financial obligations of the Association to its consolidating agents are handled by Olympic as its managing company. With the exception of unregulated local

cartage service on shipments destined within the city of Seattle, the Association pays the regular motor carrier rates on shipments moving beyond. The managing company is required to make periodic comparisons of the rates paid by the Association to its consolidators at New York, Philadelphia, and Chicago, against those paid by other organizations to consolidators performing similar services.

While the witness had no personal knowledge of a member's shipment having been moved in a car other than the Association's car, he agrees that a misloading could easily occur through error where the loading agents are performing consolidation services for many organizations. In the event such a situation arose, however, it was his opinion that the Association would bill the person responsible therefor on the basis of the applicable tariff rate, including the delivery service. For example, if, through misloading Texas freight is mistakenly placed in a Seattle car, the witness assumes the consolidator would advise Pacific to expedite that shipment and bill back the charges to the consolidator.

With the view of increasing the Association's membership, Kelley or his staff is requested to investigate any firm which he, the trustees, or any of the members, feel would be a responsible addition to the membership. If, after the investigation, it is determined that the firm's freight is such that it would not fit into the cars moved by the Association, or that its volume is insufficient to make it worth its while to join the Association, Kelley is instructed to advise the prospective member accordingly. These situations, the witness points out, result in screening out a large number of firms which heard about the Association and believed they would effectuate freight savings on their shipments by becoming members thereof. The witness concedes that Kelley has called on firms which were not referred to him by the Association. In instances in which Kelley has contacted potential members, he submits the name of the firm, advising that it has signed an appli-

cation for membership, transmits the firm's check for $100 representing its membership fee, and asks that the trustees approve or disapprove the application. The application is then considered at the trustees' meeting. Admission of new members, it appears, may be handled either by ballot prior to the board meeting, or at board meetings. The witness points out that there have been occasions when Kelley has suggested that the application not be considered because the class of freight handled by the prospective member is not compatible with the freight or volume handled by the Association. The witness contends that membership in the Association has declined during the past 2 years because of the impact of the subject complaint.

The Association's shipments are handled mostly in box cars, although a few shipments have moved in piggyback service since January 1964. Coloading of freight with other shipper associations in the same box car is engaged in where the shipments are destined to one destination and paid on one freight bill. For example, when coloading with Van-Can Co-Operative Shippers, whose freight is destined to Vancouver, B. C., a stop-off is put on the car for transloading of Pacific's freight destined to Seattle or Portland. Similar coloading is conducted with Industrial Shippers Association out of Chicago; it also coloads with Automotive Shippers Co-Operative Association. In coloading with these three shipper associations, the minutes of the trustees' meeting of October 23, 1964, reflect that the Association is thereby protecting the 60,000-pound minimum rail weight requirement. By protecting the rail carrier's minimum weight, Pacific obtains the benefit of the lower carload rate vis-a-vis a higher rate if shipments were to move on a less-than-carload basis.

In instances in which Weisfield has sufficient freight to constitute a single carload, its car is coupled onto the other cars used by Pacific in order to make up the minimum weight requirement for Pacific's entire battery. For ex-

ample, if the minimum weight were 60,000 pounds and Weisfield's freight weighed 40,000 pounds, the latter weight would be added to Pacific's battery to meet the 60,000-pound minimum. The witness considers this as part of Pacific's movements of a battery of cars, not a coloading arrangement by Pacific with Weisfield.

Neither this witness as president of the Association, nor any of its officers, incurs any reimbursable expenses on behalf of the Association .

The routing guide prepared by Kelley for members does not include routings within a city, but lists the names of various motor carriers whose services can be used in delivering a member's freight from the supplier's factory to Pacific's terminal points in New York, Philadelphia, and Chicago. For example, in the case of a shipment originating at Waukegan, Ill., or Milwaukee, Wis., the routing guide shows the names of several motor carriers which can pick up a member's shipment from the supplier and deliver it to Pacific's consolidator in Chicago for movement beyond. The purpose of the routing guide is to suggest routing information so that the members will know the nearest terminal to which their freight can be moved by such carriers for shipment via Pacific. The witness states that use of the routing guide is optional with members. If they prefer, they may use the services of other motor carriers in handling their freight to Pacific's terminal loading stations, and assume the additional freight charges, if any. It appears that the carriers listed in the routing guide are those publishing, assembling and distribution rates. A member utilizing an originating carrier not publishing such rates, the witness contends, will pay about 30 percent more. The witness agreed, on redirect examination, that Weisfield and Valu-Mart Discount Department Stores have deviated on occasions from the recommended routings shown in the routing guides on shipments handled via the Association.

Defendant Aronson's Hardware Company, Seattle, a member of the Association since its inception, has been engaged in the industrial hardware supply business for 49 years. Its merchandise is shipped in less-than-carload lots from approximately 900 to 1,000 firms, 90 percent of which originates at New York, Philadelphia, and Chicago; it also receives shipments from other eastern cities. The witness, Aronson, one of the four partners in this company, was elected a trustee of the Association at the membership meeting of October 23, 1964.

Shipments for this company average about 200 pounds, although it recently received a single shipment weighing 4,400 pounds from Chicago. Ninety percent of its business is conducted on a wholesale basis, 10 percent retail. Most of its shipments out of New York originate beyond the commercial zone in New York City, its heaviest tonnage out of the Chicago area moving from a factory located in that city. Very few shipments originate from the Philadelphia area. On shipments originating within the commercial zone, the suppliers are advised to ship to Pacific's consolidating terminal, the motor carriers utilized in these services being left to the discretion of the suppliers. On shipments originating beyond the commercial zones, the witness, on occasions, refers to the routing guide book prepared by the Association and recommends to the supplier the name of an inbound carrier to move its merchandise to Pacific's nearest loading terminal. The reason for this is because in some instances when shipments originate in certain areas in Pennsylvania, it is more convenient to handle them through Pacific's New York receiving loading terminal rather than the Philadelphia loading terminal. In some instances, the witness disregards the routing guide and suggests that the supplier use the motor carrier of its choice on inbound shipments to the terminal. In these situations, the additional inbound freight charges are included on the bill prepared by Olympic which is submitted to his company by Pacific.

The bulk of this company's shipments is handled by freight forwarders, only a small percentage being moved via the Association. Some of the articles handled by this company, such as hand tools, move under a special rate by freight forwarders. Consequently, this member does not utilize Pacific's services on these articles. Whether or not it will use Pacific's services depends upon the savings on freight charges that might be realized, and its willingness to go along with the few days' delay experienced in ultimate delivery. It appears that freight charges in some cases are prepaid by the suppliers. While this witness has no preference as to the freight forwarders used by its suppliers, he prefers to use the Association's services when savings on freight charges can be effectuated. In the opinion of the witness, the only difference between the services rendered by the freight forwarder and the Association is that the latter is much slower.

The witness learned about the Association through his friend Charlesworth, a former employee of Olympic, who informed him that a co-operative shippers association was in the process of being formed. His interest was aroused because he had been trying for several years to become a member of the Washington-Oregon Shippers Co-Operative Association, but was refused membership therein. The witness points out in this connection that one of his principal competitors of machinery in the Seattle area is a member of this latter association, and is able to save approximately 25 percent on its rates when school bids are submitted for the purchase of machinery.

This witness disclaims any responsibility for the payment of freight charges of any member of the Association other than his own. Weisfield, as a member of the Association, he asserts, has no more than a single vote on policy matters of the Association, and that no particular member dominates the affairs of the Association.

The witness avers that the relationship between Kelley and the Association is the same as between any employer

and employee; that Kelley's organization is paid on a tonnage basis for handling the Association's paper work, giving advice, and performing other services for the Association; that there is an outstanding contingent liability for prior services rendered by Kelley in connection with the organization of the Association; that the president of the Association presided at all trustees' and membership meetings attended by this witness, that the trustees' meetings generally last about 2 hours, and the decisions arrived at determined by votes of the trustees, and that Kelley's attendance at these meetings is for the purpose of answering questions posed by the trustees dealing with Association matters. While some of Kelley's recommendations at these meetings have been followed, others have been rejected, and some held in abeyance or taken under advisement. Kelley has no vote on any matters discussed and acted upon by the trustees or the membership.

The witness states he joined the Association to save money on his freight charges and thereby place his company in a more competitive position. He asserts that the Asociation's auditing firm has had a representative at some of the membership meetings to answer questions put to him by the members.

While this member paid the initial membership fee of $100 and advanced $100 towards the working capital fund, it appears that no bond was ever executed by this company.

When the matter of discontinuing the loading points at Atlanta and Charlotte was discussed at one of the membership meetings, the majority of the members, including this witness, felt that the Association was losing money on shipments out of these areas based on receipts and expenditures due to insufficient tonnages therefrom.

The witness was uncertain whether the Association's financial statements were distributed at membership meetings, but believes they were. As a graduate in ac-

counting, he stated he was interested in seeing these statements in order to determine the Association's progress. He estimates that the volume of tonnage handled by the Association from New York, Philadelphia, and Chicago, is approximately 80 carloads a year.

As previously noted, the financial statement perpared by the Association's certified public accounting firm, introduced in evidence, shows that the Association, during the 6-month period of operation June 6, 1961, to December 31, 1961, experienced a net operating loss of $7,300.59. The Association's combined deficits for the years 1962 and 1963, were $495 and $6,927, respectively. For the year 1964, it earned a net income of $15,152. Thus, the Association suffered a net operating loss in each of these periods with the exception of the year 1964.

As indicated, defendant Kelley, besides being Pacific's managing agent, is the sole proprietor of the Olympic firm, which audits freight accounts and acts as a specialist in transportation matters for its shipper-receiver clients. This firm which began operations on a part-time basis in 1952 or 1953, has been on a full-time basis since 1955. Its personnel, including Kelley, numbers eight employees. Kelley was subpoened as a rebuttal witness by the complainants. As designated manager of the Association's operating affairs and its only employee, he receives no compensation therefrom other than the 35-cents per hundred-weight on shipments handled by him. In this capacity, he performs the day-to-day operations for the Association under the direction of its board of trustees. During the organizational period prior to incorporation, he acted as the Association's traffic consultant, performing various and sundry administrative functions, including negotiations with prospective consolidators, whose quotations were submitted by him to the then Organization Committee of the predecessor association.

Insofar as the arrangements respecting the coloading of Pacific's freight from Chicago with the three afore-

mentioned shipper associations are concerned, the rail charges covering the combined freight movements are prorated, i.e., each association paying the freight charges on its own shipments in the car, or battery, plus any stop-off charges that might be involved.

Kelley occupies a similar position as managing agent with Van-Can Shippers Co-Operative, Vancouver, B. C., organized August 20, 1953, and receives, as compensation, for services similar to those performed for Pacific, 33-cents per hundredweight on the shipments handled by him for that co-operative association. This latter association is not affiliated with Pacific in any manner. Kelley admits assisting in the formation of that organization to the extent of acting as a consultant, but denies that it was organized at his suggestion, or set up as a companion organization by him for the purpose of serving Vancouver shippers through Pacific; that its only connection with Pacific is in the coloading of freight. The purpose of coloading with Van-Can and the other two shipper associations is to meet the rail carload minimum weight requirement in order to obtain the benefit of the lower carload volume rates. Van-Can utilizes the same consolidators as Pacific, the arrangements for which, it appears, were handled also through Kelley's Olympic firm.

This witness does not deny his interest in increasing Pacific's membership by having firms with desirable traffic join this organization, and admits contacting prospective members pursuant to board authorization. In some instances, he received calls from prospective members inquiring about the Association, and also followed up recommendations made by the Association. Expenses incurred by Kelley in soliciting potential members are charged to and borne by the Association. It appears that only one shipper from Vancouver, B. C., became a member of Pacific, in February 1962, but subsequently cancelled its membership for the reason that Pacific had not provided service to Vancouver. The initiation fee of $100 paid by this member was refunded.

When a membership application is received at Kelley's office, the witness, or presumably an employee of his firm, discusses this matter with the applicant with the view of ascertaining whether its freight, and tonnage, could be mixed with shipments moving via the Association. If it is concluded that the applicant would be a desirable member based on the traffic it proposes to ship via the Association, the application is submitted to the trustees for their approval. If, on the other hand, it is concluded that it would not be of benefit to the Association, the applicant is so advised. Notwithstanding this determination, if an applicant requests that his application be considered by the trustees, it is then submitted with Kelley's recommendation that the freight, in his opinion, would not benefit the Association. This negative type of situation has only occurred in one instance where the applicant was a factory representative and whose application, upon insistence by the applicant, was submitted to the trustees and ultimately rejected.

Cost sheets, similar to those provided Pacific's members, contrasting the rates members were then paying on commodities from certain origins with the costs for moving their traffic via the Van-Can Shippers Co-Operative Association, are also prepared by Olympic and sent to Van-Can's members, as well as to prospective shipper-receivers in Vancouver.

As far as can be gleaned from this record, Pacific leases office space from Terminal Facilities at a rental of $125 per month, which space is occupied also by Olympic. This rental is paid to the lessor by Pacific which, in turn, is reimbursed by Kelley, who is obligated under the 35-cent per hundredweight compensation agreement to furnish office space for the Association. Pacific assumes the heating and lighting bills in the occupied building, the charges for which the lessor prorates among all the tenants therein. The Association unloads its freight at the Northern Pacific Railroad Company's freight house in space pro-

vided by Northern Pacific Transport, its local agent in Seattle. Initially, warehouse and office space were provided by the Great Northern Railroad Company under a lease when Pacific's operations were conducted from that source. Neither Pacific nor Olympic rents any warehouse space at the present time.

The evidence shows that Kelley advised the board at its March 15, 1965 meeting, that he had never been compensated for time spent in connection with the organization of the Association, and asked the board to authorize payment in the sum of $4,000. This matter is still being negotiated by the board. The amount requested includes time spent by three of Olympic's employees, including Kelley, in assisting the board in handling problems incident to the organization of the Association. There is a conflict with respect to the exact amount involved in this matter. An itemized exhibit showing the hours and the rates per hour of the three employees, for the period November 15, 1960, to July 15, 1961, reflecting 850 hours, totals $5,750. The hourly rate for one of these employees is $5, covering 250 hours, another $7.50 per hour for 250 hours, and the third $7.50 per hour, for 350 hours. The witness testified when asked at the board meeting how much the amount would be, stated he thought it would be approximately $4,000, but that he had not determined what the actual costs would be. The larger amount is the one rendered to and pending before the Association.

An exhibit reproducing an undated letter written by Kelley to the board, states that as of January 1, 1962, Pacific had in excess of $45,000 in its checking account, which had accumulated due to the slowness of the railroads in submitting their freight bills for rail charges. The said letter sought approval or disapproval of the board to deposit an excess of $20,000 in a savings account so that some interest might accrue thereon. It was pointed out in this connection that an operating account of $20,000 should be ample to cover the then present expenses

of the Association. The letter states that "The above information regarding the excess funds is extremely confidential and it would be detrimental to the Association if this should become general knowledge." The witness testified that this was not his opinion, that the reason for treating this matter in confidence was because of outsiders not in the Association and, therefore, it should not be given out to the general public, specifically freight forwarders. This letter further states that Kelley had discussed this matter with the Association's attorney and its accountant.

Members' shipments move on published single-factor line-haul transcontinental tariff rates, subject to a minimum weight of 60,000 pounds. While members generally know what the line-haul carload rates are on particular commodities, they may or may not know beforehand the amounts advanced by the Association on their shipments handled by the inbound carriers from their suppliers' factories to the Association's loading terminals, which will vary depending upon the carriers used for this purpose and the weight of their shipments. In this latter connection, the witness observes that not all people shipping freight are familiar with transportation rates.

The evidence shows that the Association has a listing in the Chicago telephone directory, which the witness does not consider within the nature of advertising.

As previously noted, witness Anderson testified that during his employment with Olympic, he contacted potential firms with the view of becoming members of the Association. Kelley states that Anderson's time, when employed by Olympic, was spent picking up and returning Olympic's accounts in connection with the auditing of freight bills, and soliciting freight accounts for this company. While performing these services, Kelley states that Anderson called on firms which had telephoned Olympic inquiring about the Association, followed up leads which

the Association had received, and talked to any person he knew who might be interested in joining the Association. Anderson was authorized by Kelley to solicit new members for Pacific.

Due to the impact of the subject complaint, many members have withdrawn from the Association at various intervals. Of the total number withdrawing on this account, (not indicated at the hearing), all but about 10 members, in the witness' opinion, have received refunds of the amounts contributed to the Association's working capital fund. It appears that the reason for the delay in making refunds to these 10 members is the board's anxiety that they should not impair the membership by reason of the complaint.

Pacific originally started its operations with five loading points, viz, New York, Philadelphia, Chicago, Atlanta, and Charlotte. As noted previously, services from Atlanta and Charlotte were discontinued in January 1964, because of insufficient traffic from the southeastern area.

Kelley, recalled in a surrebuttal by the defendants, denies the testimony of the Bureaus' witness, Thomas, that he told him that the idea of forming the subject Association probably originated with him.

POSITION OF THE PARTIES

Complainants, on brief, contend that defendants are jointly and severally engaged in freight forwarding, as defined in section 402(a)(5) of the act, without a permit, in violation of section 410(a) of the act, in that they are engaged in providing for the transportation of property in interstate commerce for compensation, and undertaking (a) to provide for assembly, consolidation, breakbulk and distribution of shipments; (b) assume responsibility for transportation from point of receipt to point of destination; and (c) utilize the services of common carriers subject to the act for transportation between origin and desti-

nation; that Pacific's operations do not differ in any respect from those of a freight forwarder; that a member-receiver of freight in Seattle procures transportation of a shipment from Philadelphia by instructing its supplier to tender its shipment to a common carrier by motor previously designated by Pacific care of the latter's eastern consolidating agent; that said shipment is consolidated at the consolidating agent's terminal with shipments of other members and tendered as part of a consolidated shipment to a railroad for transportation to Seattle; that the consolidated rail shipment moves on a uniform straight rail bill of lading naming Pacific or its consolidating agent as consignor, and Pacific, or its distribution agent in Seattle, as consignee; that individual shipments of Pacific's members on arrival at Seattle are separated by Pacific's distribution agent and transported to the member's place of business; that Pacific bills each member based on a single factor rate in cents per hundred pounds, which includes all charges from point of origin to destination; that Pacific, compared with its members, assumes responsibility for loss or damage, and that its single factor rate is designed to cover the cost of the insurance to protect itself, thus giving a member greater protection than he is now receiving. Complainants argue that Pacific under this method of operation, is providing all of the services that section 402(a)(5) defines as those of a freight forwarder. Complainants further contend that the burden, citing several cases,[15] is on the defendants to prove that section 402(c)(1) licenses them to conduct these operations without a permit from the Commission, asserting that this they have failed to show by their evidence; that the members are not, as principals or otherwise, jointly or severally

[15] *Freight Consolidators Cooperative, Inc.* v. *United States*, 230 F. Supp. 692 (1964); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *S.E.C.* v. *Ralston Purina Co.*, 346 U.S. 119 (1953); *United States* v. *Denver and R. G. R. R.*, 191 U.S. 84 (1903); *United States* v. *Nichols*, 151 F. 2d 155; *Schlemmer* v. *Buffalo R. & P. Co.*, 205 U.S. 1 (1907); *Javierre* v. *Central Altagracia*, 217 U.S. 502 (1910).

assuming the essential risks entailed in conducting Pacific's operations; that no member bears the risk of loss in the transportation of his own shipments; that the rate quoted members before their shipments move is the measure of their maximum obligation to Pacific; that we do not have here what is contemplated by section 402(c)(1), i.e., the consolidation and distribution of freight either by the members for themselves or by Pacific as their agent, but rather the purchase of transportation from Pacific. Complainants also argue that Pacific by coloading members' shipments with shipments of members of other associations not members of Pacific, is not confining itself to the consolidation and distribution of freight for its own members, but acting, instead, as a freight forwarder providing public transportation for compensation.

The Bureau, on brief, contends that the services rendered by Pacific meet all the requirements of a freight forwarder as that term is defined in section 402(a)(5) of the act, citing, among other cases, *Atlanta Shippers Assn., Inc.,—Investigation*, 322 I.C.C. 273 (1964); that the "for-compensation" aspect of its operations is established (1) by the element of profits to Kelley; (2) its accumulated surplus of $10,000 upon which $300 interest accrued; and (3) Kelley's letter[16] of August 24, 1961, on behalf of Pacific to General Transport, Inc., its distribution agent at Portland, which states, among other matters, "We are not making money on this yet and we want to lose as little as possible." The Bureau also contends that Pacific's "holding out" of service to a portion of the general public, or a limited number or class of shippers,

[16] This letter was introduced as exhibit 28, the pertinent part of which is an admonition by Kelly concerning collect calls to Seattle, pointing out that Olympic "cannot recover on all of these calls and do [sic] not continue to expect to pay for them. * * * we have to pay the telephone bill and it is just a lot of money out of our pocket. *We are not making money on this yet and we want to lose as little as possible.* Try the mails and it will help us." [Italics added.]

is a holding out within the meaning of the term freight forwarder defined in section 402(a)(5); that Pacific, prior to and after incorporation, through Kelley, his partners, associates, and/or employees, carried on an extensive solicitation campaign to enroll new members; that responsibility for safe transportation is not assumed by the members, and that the control thereof by members is essential for the type of association recognized by section 402(c)(1) beyond the scope of part IV of the act, citing the *Atlanta* case, *supra;* that Pacific is not controlled by its members or trustees, and that Kelley, as manager, exercised complete control over all aspects of the Association; that Kelley, as the entrepreneur, organized the Association, incurred all expenses therefor, made all arrangements for consolidation and distribution agents, printed rate sheets and schedules, contacted rail representatives concerning line-haul rates; that shipper-members do not assume the risks, liabilities, and control, of the Association's operations; that Pacific is solely responsible for carriers' freight charges and thus shields individual members from risks and liabilities which must be present to be a bona fide shippers association; that the bonds executed by members guaranteeing payment of freight charges protected Pacific, not the carriers. The Bureau further argues that by coloading freight with another shippers' association, Pacific is not consolidating freight for its members alone, and, therefore, is not conforming with the provisions of section 402(c)(1), and thereby loses its exempt status under the statute. The Bureau concludes that Pacific and Kelley are and have engaged in transportation, or providing for transportation, of property in interstate or foreign commerce, for compensation, as freight forwarders, without appropriate authority from the Commission; that by coloading its freight with other shippers' associations, Pacific is not entitled to the benefits of the exemption set forth in section 402(c)(1), part IV, of the act.

Pennant contends, on brief, that Pacific is a bona fide nonprofit shippers' association operating in conformity with the exemption set forth in the statute, performing or arranging for consolidation and distribution of freight for themselves or the members thereof for the purpose of securing the benefits of carload volume rates; that Pennant's receiving and consolidating services are strictly in accord with the exemption set forth in section 402(c)(2) of the act; that it is not subject to the jurisdiction of the Commission; that this section requires a shippers' agent, acting as receiving agent in the consolidation of freight cars, to confine its services and responsibilities to the terminal area in which such operations are being performed; that its function as a consolidation shippers' agent for the Association was to accept freight on behalf thereof at New York and Philadelphia, consigned to its members, consolidate it into carload lots, prepare a manifest thereof, and turn the cars over to the railroad. Pennant further contends that it performs no activities whatsoever outside its origin terminal areas; that its sole activity is to receive and consolidate carload freight; that its operations as agent are not subject to section 402(a)(5) defining the term freight forwarder; that the exemptions in section 402(c)(1) and (2) cover the operations of the Association and the consolidation agents, and do not require authority from the Commission; that the Association's operations fall within the decision in *Pacific Coast Wholesalers* v. *United States*, 81 F. Supp. 991; affirmed per curiam, 338 U.S. 689 (1950); that Pacific has been operating under the dominion and control of its members solely for the purposes set forth in the statute. Pennant further contends that section 402(c) was added to the act because of the similarity of operations between shippers' associations and freight forwarders; that the exemption therein covers the subject Association and consolidation agents. It concludes that any cease and desist order against it would constitute an unwarranted and detrimental action against an innocent party.

It is defendants' position that the burden is on the complainants as private parties, not on the defendants, to prove their material allegations, citing *National Motor Freight Traffic Assn., Inc.* v. *United States*, 242 F. Supp. 601 (1965). The defendants contend that their operations are those of a shipper-inspired, shipper-controlled, and shipper-dominated association of shippers exempt from regulation under section 402(c)(1), citing the *Atlanta* case, *supra*, and the legislative history of this section; that the complainants and the Bureau have failed to prove complainants' allegations of illegality; that the physical similarity of transportation services available to members through the Association and those of freight forwarders, which they admit, is not determinative of the issue of illegality; that the Association's handling of prepaid shipments from nonmembers to members where freight savings redound to the benefit of the member-consignee, is not a for-hire, a "holding out" to the public, or operations for profit, citing *Pacific Coast Wholesalers' Assn.* case, *supra;* that no one other than the Association has assumed any financial risk; that it is an exempt shippers' association under the tests in the *Atlanta* case, *supra;* that (1) it is a group or association of shippers organized and operating as a nonprofit corporation for the purpose of consolidating or distributing freight for its members, on a nonprofit basis, to secure the benefits of carload, truckload, or other volume rates authorized by the statute; (2) that defendants utilize the Association's services for that purpose; and (3) that the operations complained of are not subject to Commission regulation, citing *National Motor Freight* v. *New Hampshire Shippers Co-Op*, 323 I.C.C. 658; that shipments are not handled for nonmembers; that members are apprised of the points to which Pacific provides service and furnished a list of cartage agents handling shipments at these locations; that the idea and formation of the Association came from consignee-members who have consistently retained control through election to and participation on its board;

that the board has met regularly and frequently, discussed and taken positions on broad policy matters, including, among others, discontinuance of services from Atlanta and Charlotte, lease of space for management agency to conduct operations on behalf of the Association; compensation to be paid loading agents and its managing agent; that no evidence has been submitted that the per hundredweight charge assessed by the management agency is unreasonable; that should revenue received by Pacific exceed its costs of operation, any excess belongs to the Association and its members, not to Kelley; that while Pacific has delegated day-to-day operations to its management agent, the members and the elected board ultimately assume the essential risks and burdens of the enterprise, and control, direct, and dominate its operations. Defendants further argue that no showing has been made that the Association's operations are mere facades to cover the operations of a private entrepreneur for profit, presumably Kelley, nor that it is other than nonprofit in nature; that it is controlled by its board, which has power to hire and fire management personnel; that no proof has been advanced herein that Pacific's operations are anything other than consolidating and distributing freight for members on a nonprofit basis for the purpose of securing volume rates; that the evidence fails to establish that its operations are such as to bring them under Commission jurisdiction; that complainants have failed to sustain their burden of proof, and that the complaint should be dismissed.

DISCUSSION AND CONCLUSIONS

An important question concerning burden of proof raised by complainants should be disposed of before discussing the principal issues involved.

Complainants argue at some length that the burden is on the defendants to prove that they are entitled by section 402(c)(1) to conduct the aforementioned operations

without a permit from the Commission, citing six cases (see footnote 15). The defendants aver that the burden is on complainants, as private parties, to prove the material allegations of the complaint, citing the recent *National Motor Freight* case, *supra*, (242 F. Supp. 601) (1965), unholding the Commission's order dismissing plaintiffs' complaint (complainants herein).

Two of the seven cases cited by complainants in the instant proceeding in support of their contention were cited by them as plaintiffs in the latter court case. The court observed that all of the cases cited by the plaintiffs in that action "were ones in which the Government, not a private complainant, brought suit claiming a violation of law. Also, in each case, the specific facts which would exempt the defendant from liability were within the exclusive possession of the defendants," a situation not shown in the case before the court. The court further observed that "the procedural statutes involved place the burden of proof on the proponent of a rule or order," [17] and that it is the general rule that "the burden of proof lies upon him who affirms, not him who denies," citing *Philadelphia Co.* v. *Securities and Exchange Commission*, 175 F. 2d, 808, 818, 84 U.S. App. D. C. 73, 83, (1949). Complainants contend that the court's ruling is incorrect. Plaintiffs motion for a new trial was denied by the court on November 9, 1965.

Plaintiffs (complainants here) in the *National Motor Freight* case, *supra*, sought to set aside the Commission's order [18] dismissing their complaint, which had alleged that the activities of Delaware Valley Freight Terminal of Camden, N. J.,—aided and abetted by the other defendants therein—were those of a freight forwarder in interstate commerce without appropriate authority from

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[17] Citing sections 1004 and 1006 of the Administrative Procedure Act, 5 U.S.C., and section 403(f) of the Interstate Commerce Act.

[18] *National Motor Freight Traffic Assn.* v. *Delaware Valley*, 323 I.C.C. 560 (1963).

the Commission. The hearing examiner found that the burden was on the complainants to establish by competent evidence the material allegations of their complaint. The Commission's order, finding the statement of facts, conclusions, and findings of the examiner correct in all respects, affirmed and adopted them as its own, and dismissed the complaint.

It is noted that of the five remaining cases cited by complainants in the instant proceeding, the Government was the moving party in three of them. The rulings as to burden of proof in the two remaining cases, to wit, *Schlemmer* v. *Buffalo R. & P. R. Co.*, 205 U.S. 1 (1907), and *Javierre* v. *Central Atlagracia*, 217 U.S. 502 (1910), are clearly inapposite to the particular issue here dealing with a clarifying provision in a statute. The former dealt with a proviso in the Safety Appliance Act of March 2, 1893, the court observing that if the defendant wished to rely upon this proviso, the burden was upon it to bring itself within the exception. The latter case dealt with a contract in which the appellant sought to escape liability on the ground of a condition subsequent. The court there observed that "When a proviso like this carves an exception out of the body of a statute or contract those who set up such exception must prove it." The instant proceeding does not concern itself with either an exception or a proviso carved out of the body of a statute. The Commission's treatment of section 402(c) as a "clarifying provision" rather than as a true exemption from section 402(a)(5) was upheld by the court in the *National Motor Freight* case, *supra*, wherein it stated that "The legislative history of the statute, as well as its language, clearly would justify such an interpretation." [19]

The examiner concludes and finds that the complainants, as private parties and proponents of an order from

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[19] Citing House Report No. 1172, 77th Cong., 1st Sess., pages 5 and 6.

the Commission, have the burden of establishing that the defendant Association, aided and abetted by the other defendants, is engaging in freight forwarder services without a permit in violation of section 410(a) of the act.

Since the complainants have abandoned, on brief, their allegations of violations of sections 216(a), 209(a), and 211(a), of the act, the only issue to be determined is whether the operations engaged in by Pacific are those of a bona fide shippers' association, whose right to render a transportation service for members is recognized by section 402(c)(1), or whether its operations are those of a freight forwarder within the meaning of the term freight forwarder described in section 402(a)(5), and, therefore, subject to regulation under section 410(a) of the act.

Section 402(a)(5), part IV, of the act, defines the term "freight forwarder" as follows:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to parts I, II, or III of this act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to parts I, II, or III of this act.

Section 402(c)(1), part IV, of the act, exempting shippers' associations from regulation, reads:

> The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, * * *.

The licensing provision under section 410(a)(1), part IV, of the act, reads:

> No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service; * * *.

The phrase "service subject to this part" is defined in section 402(a)(7) as meaning:

> * * * any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, * * *.

No question is raised here concerning the Association's corporate status in conducting its operations. This question was determined by the Commission, after oral argument and reconsideration in the *Atlanta* case, *supra*,—

> that Congress did not intend that shippers must avoid use of the corporate form in conducting operations which otherwise would be clearly those of a nonprofit group or association of shippers within the meaning of section 402(c) of the act.

Admittedly the physical operations of a freight forwarder and a bona fide shippers' association parallel each other in many essential respects, the former taking a portion of such savings as may be realized as its profit while the latter does not. This similarity of physical operations, however, is not the yard stick by which to gauge the true status of a legitimate shippers' association. Moreover, the freight forwarder, unlike the bona fide shippers' association itself, assumes responsibility for the transportation

of property from point of receipt to point of destination. While part IV of the act provides for the economic regulation of freight forwarders, it also recognizes the right of all shippers, or their group, to combine their goods, on a nonprofit basis, for the purpose of obtaining the transportation savings flowing from their collective ability to utilize volume rates. At the same time, the statute precludes a shippers' association from purchasing, "for compensation," a complete transportation service in which the details, risks, and responsibilities of freight assembly, consolidation, forwarding, break-bulk, and distribution are assumed for it by a person not licensed by the Commission.

In distinguishing between regulated freight forwarder service and nonregulated but physically similar operations of nonprofit groups or associations of shippers, the Commission in the *Atlanta* case, *supra*, pages 278 and 279, stated:

> * * * whenever an apparent shippers' group or association ostensibly consolidates and distributes freight, the lawfulness of the operation may be determined by application of either of the following standards, depending upon the particular facts and circumstances of the questioned operations: (1) whether the group or association itself is, in substance, engaged in the business of serving the public as a forwarder of property for compensation, or in other words, whether it is a seller of forwarder service, and (2) whether the group or association (or the shipper-members through their organization) is purchasing for compensation, a complete transportation service in which the essential risks and burdens of freight assembly, consolidation, forwarding, break-bulk, and distribution are assumed for it (or its members) by a person not licensed by this Commission.

Where shipper-members themselves, to the exclusion of all others, control, direct, and dominate the freight consolidation and distribution services and assume all the

risks and burdens, such operations are of the character specifically safeguarded by section 402(c)(1).

The appropriate test to be applied whether the shipper-members of an association are purchasing a complete freight forwarder service is succinctly stated at page 283 of the *Atlanta* case, *supra*, wherein its is stated:

> Are the freight consolidating and distributing operations such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risks and burdens, financial and otherwise, of conducting the operations under consideration?

To avoid regulation, a group or association of shippers must stand aloof to the lure of a public calling and not handle shipments unrelated to the nontransportation functions of its shipper-members. In this connection, the Commission observed in the *Atlanta* case, *supra*, that:

> * * * when shippers acting together organize, operate, and control their own corporation to conduct the necessary consolidation and distribution functions with respect to their (the shippers') own freight, and if such shippers bear the important risks and burdens which those operations entail (including the risk of loss or of obtaining no savings by such joint activity), it is clear that there is no holding out to the general public to provide transportation of property for compensation within the meaning of the forwarder definition.

Thus, it is abundantly clear that the essential functions of a freight forwarder are to assemble, consolidate, break-bulk, distribute the consignor's freight, and assume responsibility for the transportation of property from point of receipt to point of destination. Applying these elements to the facts in this record, it has not been shown that Pacific's operations include all of the essential functions of freight forwarding, or that this Association as-

sumes responsibility for the transportation of members' shipments from point of receipt to point of destination.

The evidence shows that the Association does no more than provide a transportation service for its members on a nonprofit basis. It has a very active board of trustees, whose members are elected by the membership at its annual meetings; that nominations are made from the floor as well as by a nominating committee.

Substantially all of the member-consignee shipments handled through the Association move on a collect basis. Some isolated shipments do move on a prepaid basis. In these latter instances, the freight savings are passed on to the member-consignees involved. The issue in the *Pacific Coast Wholesalers* case, *supra*, was whether the association therein was subject to regulation as a freight forwarder or stood in exempt status under section 402 (c) (1). The Supreme Court in affirming, per curiam, the findings of the lower court, stated:

> There is nothing in the language of the act or the legislative history to suggest that Congress intended the exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b. destination (delivered price). On the cotnrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative. Under that test, the valid claim of the Association to the statutory exemption is established by the original Commission decision.[20]

There is no merit to the Bureau's argument that Kelley, as manager of the Association, has exercised complete control over all aspects of the Association. All of the functions performed by Kelley were within the purview of his obligations and duties as managing agent, and exercised pursuant to approval and direction of the trustees.

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[20] *Pacific Coast Wholesalers' Assn., Investigation of Status*, 264 I.C.C. 134 (1945).

The evidence discloses that he is an experienced traffic consultant, and attends board and membership meetings for the purpose of submitting reports and answering questions pertaining to the Association's operating affairs, but has no vote. While not all members of shippers' associations, generally speaking, have an intimate knowledge of rate tariffs, and meet to consider reports and recommendations concerning affairs of their associations, their principal concern is providing a means of transporting their goods and receiving the savings in transportation that result from such operations. In the instant proceeding, the board of trustees obtains advice from Kelley as the Association's manager, who was employed and entrusted with the responsibility for the day-to-day operations of the organization, just as it also obtains financial statements from its certified public accounting firm and legal assistance from its attorney. Kelley's employment, which is at the pleasure of the Association, may be terminated at any time. No question has been raised on this record that the compensation of 35-cents per hundredweight on shipments paid to Kelley for his overall services to the Association, including administrative services under his contract, is excessive. Whether or not the idea of forming this organization originated with Kelley or someone else is immaterial, and no unlawful inference can be drawn therefrom. In fact, the real impetus behind the establishing of this Association began at the first informal meeting attended by approximately eight shippers in the Seattle area. Nor can any unlawful inference of control be attributed to Kelley because he and some of his employees in his own organization, Olympic, solicited, from time to time, on their own initiative, or at the direction of the board, potential members to join the Association.

A case factually similar to the one at bar is *National Motor Freight* v. *New Hampshire Shippers Co-Op.*, 323 I.C.C. 658 (1964). The complainants in that case, who are the complainants here, alleged that the defendant and certain named individuals and companies were collectively

violating the same sections of the act as here. That organization, as in the instant proceeding, employed a traffic consultant as its general manager; that potential members were referred to its general manager who, in turn, furnished them with specific facets of the organization's operations. The management there, as here, met annually; the bulk of its business was carried on by its board of directors, the members of which were elected by the membership; the board, as here, met regularly at least once a month, attended, in some instances by potential members; notices, as here, of meetings were sent to members. The general manager, as here, attended the board meetings, but had no vote. Matters, as here, were brought before the board by the general manager, accompanied by his recommendations, some of which, as here, were adopted and some refused. The general manager initially was paid $50 a week plus $10 traveling expenses. Subsequently, his compensation was based on the organization's gross billings. He was given responsibility, as here, for supervision and management of the Co-Operative's day-to-day operations and submitting reports and recommendations to the board; he made arrangements with cartage agents at various points; determined charges to be assessed members for their shipments, including assembly and distribution rates, line-haul rates, cost to the Co-Operative of cartage and loading shipments, as well as its overhead expenses, all subject, as here, to actions of the board. The general manager was initially given authority to cosign checks. Subsequently, he was authorized to sign checks so that the operations would not be hindered when the treasurer was beyond the immediate area.

The Commission, division 1, in that case held that the Co-Operative was a bona fide shippers' association exempt from regulation under the act and that it was entitled to continue its present operations without authority from the Commission. The Commission went on to say that:

> While these members do receive a service which is physically comparable to that obtainable from a reg-

ulated freight forwarder, albeit more limited territorially, one of the principal purposes of the Association is to furnish such an integrated service without it being necessary for its members to make individual arrangements with carriers and other agents for the handling of shipments at intermediate points or at destination. There is thus normally no need for members to have more than a general knowledge of the manner in which their shipments are handled. * * * Moreover, the members are apprised of the points which NHS has made provision to service and a list of cartage agents who handle the shipments at these locations is available as are the names of the carriers employed. * * * The initial idea for NHS' formation came from shippers; shippers formed it; only shippers are members; and they have consistently retained effective control over it through the election and participation of a number of them on the board of directors. * * * Moreover, all commitments to members * * * which are necessary for its operations are made by NHS in its name * * * and not by an independent contractor; * * *.

In much of the board's deliberations it has obtained cogent facts and advice from the general manager whom it employed and entrusted with the responsibility for the day-to-day operations of the organization. * * *

The board has accepted this advice on many occasions as might be expected of any organization that hires and pays a supervisor. It did not, however, always accept it or feel bound to do so * * *.

The Commission concluded that:

The evidence, as a whole, demonstrates that while NHS' board of directors has delegated certain authority for day-to-day operations to its general manager, the members and their elected board alone ultimately assume the essential risks and burdens of the enterprise as well as control, direct, and dominate its operations. This is then a shipper-inspired, shipper-

organized, shipper-underwritten, and shipper-controlled organization, and we conclude that it is exempt from our regulation by virtue of section 402(c) of the act.

The material facts in the case at hand parallel substantially those considered in the *New Hampshire* case, *supra*, and warrant similar conclusions and findings. Kelley, as managing agent, assumes no responsibility for any deficit of the Association, and has no interest in any firm serving the Association as carrier, loading or delivery agent, or in any other capacity other than as manager. In the event Pacific's revenue exceeds its cost of operations, such excess belongs to the Association, not to Kelley.

CO-LOADING

Due to lack of sufficient tonnage in meeting the rail minimum weight requirements necessary to obtain the benefit of the lower volume rates, Pacific, as noted, has been coloading its individual shipments from Chicago with three other shippers' associations, one of which is located in Vancouver, B. C. These combined loadings are tendered to the rail carriers as a single rail shipment.

The complainants argue that Pacific, in these situations, is not confining itself to the consolidation and distribution of freight for its members, but is providing public transportation, for compensation, as a freight forwarder. It is the Bureau's contention that when an otherwise bona fide shipper association coloads its freight with that of another association, it automatically loses its exempt status because it no longer handles the freight for its members exclusively. The defendants did not discuss this question on brief.

This question of coloading between legitimate shippers' associations appears to be one of first impression not directly passed upon by the Commission.

As previously noted, the rail charges in these situations are prorated so that each association pays for its own shipments in the car, or battery, plus any additional charges that might be involved. While part IV, section 404(d), specifically provides for joint loadings of traffic between freight forwarders, the clarifying provisions of section 402(c) are silent on this matter. This situation, therefore, poses the question whether the statute, by construction, prohibits coloading of freight between bona fide shippers' associations. Considering the purport and overall purposes sought to be achieved thereunder, and the distinction between a freight forwarder and a shippers' association, the examiner thinks not.

As noted, many of the essential functions of shippers' associations are identical with those of freight forwarders. Aside from the fact that the principal purpose underlying the statute authorizing a shipper, or group or association of shippers, to consolidate or distribute freight for themselves or the members thereof is to obtain the benefit of volume rates, the intendment of the statute also contemplates expedited movements of freight shipments. Without the benefit of coloading, instances could arise when individual shipments of members would be delayed while awaiting receipt by the loading agent of sufficient tonnage to be consolidated into carload lots. Such delaying situations would obviously defeat one of the purposes of the statute. More importantly, part IV of the act deals principally with the operations of freight forwarders. In any event, no profit accrues to the participating shippers' associations by combining their consolidated shipments into a single car.

To construe the statute as urged by complainants and the Bureau in these situations is to place a strained interpretation thereon not consistent with the underlying purposes for which it was enacted. Moreover, had Congress intended that joint operations of this nature would run counter to the statute, it could easily have provided lan-

guage prohibiting such arrangements. The examiner is constrained, therefore, to construe the statute liberally and conclude that the practice of coloading of freight between legitimate shippers' associations, where no element of profit accrues therefrom, and the sole purpose of which is to meet minimum weight requirements in order to obtain the benefits of volume rates, does not contravene the clarifying provisions set forth in section 402(c) of the act, or is otherwise unlawful. In these circumstances, where a profit is lacking, it must be held that Pacific is not thereby engaging in a public freight forwarding service for compensation, or that such operations cause it to lose its exempt status under the statute.

Finally, the clarifying provision of section 402(c)(2) of the act, exempting local shippers' agents from regulation, provide that part IV shall not be construed to apply:

> * * * (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities are confined to the terminal area in which such operations are performed.

No showing has been made here that defendant Pennant has not been conducting its carloading operations as a shippers' agent for Pacific confining its services and responsibilities in connection therewith to its terminal areas in New York and Philadelphia in which such operations are performed. The examiner concludes that the services performed by this defendant as a local shippers' agent fall within the exempt provisions of the aforesaid section of the act.

In light of the foregoing discussion and an analysis of all the evidence in the record, the examiner concludes that the traffic handled by the defendant Association is for the members thereof; that the Association has been operated in good faith for the purpose of effecting savings in freight charges for its members by securing the benefits

of carload, truckload, or other volume rates, and that it is operated on a nonprofit basis as contemplated by the exempt provisions of section 402(c)(1) and (2), and that none of the defendants herein is engaging in services as freight forwarders within the meaning of section 402(a)(5) of the act. While the trustees have delegated the overall day-to-day operations to the Association's managing agent, Kelley, who is its only employee, the minutes of the trustees' and membership meetings clearly establish that the members and their elected trustees assume the essential risks and burdens of the Association as well as control, direct, and dominate its operations. The examiner further concludes that the evidence adduced by the complainant and the Bureau fails to establish that the operations conducted by the defendants are not exempt from regulation by the Commission under section 402(c)(1) and (2) of the act.

The examiner concludes that the complainants have failed to sustain the burden of proof in establishing the allegations in their complaint.

FINDINGS

Upon consideration of all the evidence of record and the arguments on briefs, the examiner finds that neither Pacific, nor any of the defendants herein, has been shown to be engaged in services as freight forwarders, as that term is defined in section 402(a)(5) of the Interstate Commerce Act, in violation of section 410(a) thereof, as alleged in the complaint; and that the complaint should be dismissed.

APPENDIX A

Names and addresses of all defendants

Pacific Progress Shippers Association, Inc.
558 Occidental Avenue, South
Seattle, Wash.

Frank Kelley,[1]
Doing business as Olympic Traffic Service
558 Occidental Avenue, South,
Seattle, Wash.

Donald Deits, Traffic Manager,
Weisfield's, Inc.
Seattle, Wash.

William H. Turner
4151 South First Street,
Seattle, Wash.

C. B. Holder
4755 South First Street,
Seattle, Wash.

Virgil Fesenmaier
525 North 71st Street,
Seattle, Wash.

Herbert I. Rosen
3225 - 6th Street South,
Seattle, Wash.

James MacKenzie
2320 S. E. Grand Avenue,
Portland, Oreg.

Edward F. Colcock
Terminal Sales Building,
Seattle, Wash.

Norman Rosenzweig
6017 - 30th St. N. E.
Seattle, Wash.

Karl Iverson, Vice President,
Weisfield's, Inc.
800 South Michigan Street,
Seattle, Wash.

Roger Phillips
N. 1017 Washington,
Spokane, Wash.

Stanford Bean
4740 Roosevelt Way, N. E.
Seattle, Wash.

William Armitage
1101 S. W. Washington,
Portland, Oreg.

Pennant Shippers Agents, Inc.
Pier 66, North River,
New York, N. Y.

Pennant Shippers Agents, Inc.
Delaware Avenue & Jackson St.,
Philadelphia, Pa.

Freight Delivery Service
227 Thurmond N. W.,
Atlanta, Ga.

Aluminum Supply Company
800 North Francher Road,
Spokane, Wash.

Aronson's Hardware Company
1415 - 1st Avenue,
Seattle, Wash.

Associated Dime Stores of Washington
2114 Western Street,
Seattle, Wash.

Beaver Wholesale Company
804 - 6th Street South,
Seattle, Wash.

Boulton Insulation Company
233 East Riverside,
Spokane, Wash.

Builders Specialities, Inc.
3601 Greenwood North,
Seattle, Wash.

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[1] Managing agent of defendant Pacific Progress Shippers Association, Inc.

Names and addresses of all defendants

Cemac Infant Gifts and Sundries
127 West Boone, Street,
Spokane, Wash.

Chas. R. Watts Company
6th N. W. and Leary Way, N.W.,
Seattle, Wash.

Otto Chotzen
1012 Western Street,
Seattle, Wash.

Comer & Hanby Federated
Wholesalers, Inc.
1917 First Avenue,
Seattle, Wash.

Eagle Metals Company
4755 First Street South,
Seattle, Wash.

Eagle Metals Company
2336 North Randolph Avenue,
Portland, Oreg.

Empire Childrens Wear Co.
2609 First Avenue,
Seattle, Wash.

Ernst Hardware Company
6th and Pike Streets,
Seattle, Wash.

F. C. Wolf and Sons
2102 Pacific Avenue,
Tacoma, Wash.

Government Mart, Inc.
11011 Pacific Highway, S. W.,
Tacoma, Wash.

Hardware Wholesalers, Inc.
Sinto and Division Streets,
Spokane, Wash.

Herschman-Meridith Mdse.
Company
717 Virginia Street,
Seattle, Wash.

House of Values
416 Holgate Street,
Seattle, Wash.

I. Layton Creations
225 S. E. Main Street,
Portland, Oreg.

Industrial Air Products Co.
3200 N. Y. Yeon Street,
Portland, Oreg.

Infants Speciality Company
409 Yale Avenue North,
Seattle, Wash.

Inland Empire Toys, Inc.
1017 North Washington Street,
Spokane, Wash.

Jafco Distributors
411 Westlake North,
Seattle, Wash.

Kalberer Hotel Supply Company
403 N. W. 5th Street,
Portland, Oreg.

King-Fisher Mattress Company
1100 N. E. 21st Street,
Portland, Oreg.

Ash Margulis
10 N. W. 5th Street,
Portland, Oreg.

May Hardware Company
2320 S. E. Grand Avenue,
Portland, Oreg.

McDonald & Company
414 Boren Street North,
Seattle, Wash.

McRae and Connor Company
123 South Madison Street,
Spokane, Wash.

Meridith and Gosling, Inc.
402 North Hogan Street,
Spokane, Wash.

Names and addresses of all defendants

Mission Supply Company
3rd and Wall Streets,
Seattle, Wash.

Pacific Metals Company
4151 First Street South,
Seattle, Wash.

Pacific Metals Company
6111 East Valleyway,
Spokane, Wash.

Pacific Metals Company
503 N. W. Park Avenue,
Portland, Oreg.

Pacific Stationery & Supply Co.
415 S. W. Second Street,
Portland, Oreg.

Pacific Yard Service
539 S. E. Divison Place,
Portland, Oreg.

Payless Drug Stores, Inc.
800 Main Street,
Spokane, Wash.

Payless Drug Co. of Oregon
1101 S. W. Washington Street,
Portland, Oreg.

R. H. Brown Company
604 N. W. 6th Street,
Portland, Oreg.

Ben Rybke
109 S. W. 4th Avenue,
Portland, Oreg.

Seattle Radio Supply Co., Inc.
2117 Second Street,
Seattle, Wash.

Seattle Sporting Goods, Inc.
4740 Roosevelt Way, N. E.,
Seattle, Wash.

Valu-Mart Discount Dept. Stores
5959 South Carson Street,
Seattle, Wash.

Valu-Mart Discount Dept. Stores
5201 East Sprague,
Spokane, Wash.

Weisfield's, Inc.
617 West Main Street,
Spokane, Wash.

Weisfield's, Inc.
800 South Michigan Street,
Seattle, Wash.

Weisfield's, Inc.
530 W. W. Washington Street,
Portland, Oreg.

West Stores
55 N. E. Farragut Street,
Portland, Oreg.

Western Seat Cover Company
308 N. W. 11th Street,
Portland, Oreg.

Wholesale Athletic Supply Co.
901 Harrison Street,
Seattle, Wash.

Wm. F. Niemi Manufacturing Co.
417 East Pine Street,
Seattle, Wash.

Wonder Built Mattress Co.
7755 North Williams Street,
Portland, Oreg.

World Wide Distributors, Inc.
323 First Street North,
Seattle, Wash.

APPENDIX B

Pertinent Excerpts From By-Laws Of Pacific Progress Shippers Association, Inc.

ARTICLE II.—MEMBERSHIP

Section 1. Eligibility. Individuals, copartnerships and corporations which are actually engaged in the shipment and receipt of commodities moving in commerce shall be eligible for membership in the corporation. Common or contract carriers shall be ineligible for membership.

Section 2. Election of Members. Members shall be elected by the board of trustees. An affirmative vote of a majority of the trustees shall be required for election.

Section 3. Voice. No member shall have any greater voice, vote, authority or interest in the corporation than any other member.

* * * *

Section 6. Voting Rights. Each member shall be entitled to one vote on each matter submitted to a vote of the members; * * *.

Section 7. Termination of Membership. The board of trustees by affirmaitve vote of two-thirds (⅔ds) of all of the members of the board, may suspend or expel a member for cause after an appropriate hearing, and, by a majority vote of those present at any regularly constituted meeting, may terminate the membership of any member who becomes ineligible for membership, or suspend or expel any member who shall be in default in the payment of obligations due the corporation.

Section 8. Resignation. Any member may resign by filing a written resignation with the secretary, but such resignation shall not relieve the member so resigning of the obligation to pay any dues, assessments or other charges theretofore accrued and unpaid. On resignation any working capital advanced by the member to the cor-

poration will be returned to the member upon settlement of any outstanding obligations of the member to the corporation.

* * * *

Section 11. Membership Fees and Dues. The membership fee shall be One Hundred Dollars ($100) payable at the time application for membership is submitted. The corporation shall have no annual dues. The funds derived from the payment of membership fees shall be held in a separate account and used only as authorized by the board of trustees.

ARTICLE III.—MEETINGS

Section 1. Annual Meetings. An annual meeting of the members shall be held at a place in Seattle, Wash., to be designated by the president. Such meetings shall be held on the third Tuesday in the month of September in each year, beginning with the year 1961, * * *.

Section 2. Special Meetings. Special meetings of the members may be called by the president. Any three (3) trustees or not less than one-tenth (1/10th) of the members having voting rights may call a special meeting of the members at any time for any specific purpose. Notice of such meeting shall state the purpose thereof and shall be mailed to each member.

Section 3. Quorum. A majority of the members in good standing, present in person or by proxy, shall constitute a quorum for the transaction of any business at any meeting of the members. * * *.

Section 4. Notice of Meetings. Written or printed notice stating the time and place of any meeting of members shall be delivered, either personally or by mail, to each member entitled to vote at such meeting, not less than ten (10) nor more than fifty (50) days before the date of such meeting, by or at the direction of the president, or the secretary, or the officers or persons calling

the meeting. The purpose or purposes for which the meeting is called shall be stated in the notice. * * *.

ARTICLE IV.—BOARD OF TRUSTEES

Section 1. General Powers. The affairs of the corporation shall be managed by its board of trustees.

Section 2. Number, Tenure and Qualifications. The number of trustees shall be seven (7). Each trustee shall hold office until the next annual meeting of members. Each trustee shall take office immediately after his election and shall remain in office until his successor shall have been elected and qualified. Only members of the corporation and their designated representatives shall be eligible to hold the office of trustee.

Section 3. Regular Meetings. Meetings of the board of trustees shall be held immediately following the adjournment of any meeting of the members and at such other times and places as the board may by resolution direct.

Section 4. Special Meetings. Special meetings of the board of trustees may be called by or at the request of the president or any three (3) trustees. * * *.

* * * *

Section 7. Compensation. Members of the board of trustees shall serve without compensation but shall be reimbursed for their reasonable expenses incurred in the performance of their duties. No trustee shall be an employee of the corporation.

* * * *

ARTICLE V.—OFFICERS

Section 1. Officers. The officers of the corporation shall be a president, one or more vice presidents, * * *, a secretary, a treasurer, and such other officers as may be elected in accordance with the provisions of this article. The board of trustees may elect or appoint such other officers, including one or more assistant secretaries or one

or more assistant treasurers, as it shall deem desirable, * * *.

Section 2. Election and Term of Office. The officers of the corporation shall be elected annually by the board of trustees at its first meeting and thereafter at its regular September meeting. Each officer shall hold office until his successor shall have been duly elected and shall have qualified.

* * * *

ARTICLE XI.—OPERATIONS

Pool car and pool truck operations will be established upon ten (10) days' notice to all members and upon approval by a majority of the board of trustees. Such notice shall contain all pertinent information on administrative and handling charges which are to be assessed against members participating in the movement on the basis of a flat charge per hundred pounds of weight, based on actual out-of-pocket costs. Such charge is to include a deficit charge to cover deficiencies in carload minimum weights. When charges are not assessed on the basis of modified rule 10, any minimum weight deficit penalty will be prorated on the basis of percentage of freight tonnage each member moves in the specific car or truckload movement. The board of trustees may by resolution adopt a minimum charge sufficient to cover out-of-pocket costs for each individual shipment. Pickup or inbound charges paid by the consolidating agency at the origin point will be advanced against the specific shipment on which the charges were paid. The Association may coload with other associations or groups but not with common or contract carriers.

ARTICLE XII.—SPECIAL ASSESSMENTS—MADE ONLY AGAINST MEMBERS AGREEING TO THEM IN ADVANCE

Special assessments may be levied by the board of trustees to pay expenses incurred in establishing new

operations or in performing unusual services only on the following conditions. Such assessments shall be made only against those members agreeing in advance to participate in such new operations or to share the cost of the performance of the unusual service. Such assessment shall be prorated equitably among all the members agreeing in advance to participate in the new operation or unusual service. Any surplus from such assessment shall be refunded to the participating members as soon as practicable after the new operation has been established or the unusual service performed and paid for.

ARTICLE XIII.—CLAIMS

All claims for loss or damage to shipments moving in operations established by the corporation shall be handled by individual members directly with the consolidator, distributor or carrier. The corporation shall assign all interest in such claims to the individual members, shall furnish the members with all information and documents necessary to prosecute the claim and shall assist members in the collection of the claim.

ARTICLE XIV.—WORKING CAPITAL

Each member upon acceptance of his membership shall within seven (7) days thereafter deposit with the treasurer of the corporation a working capital advance of a sum equal to one week's freight bills from area covered by the Association's operations and in no event shall this working capital advance be less than One Hundred Dollars ($100). The treasurer of the corporation will maintain a separate record of all working capital advances. On termination of membership, for any cause, all working capital advanced by a member in excess of charges incurred will be promptly refunded to such member. Working capital advance deposits may be reduced or modified as the board of trustees determines.

ARTICLE XV.—BOND FOR PAYMENT OF CHARGES

Each member, within fourteen (14) days after acceptance of his membership application, shall file with the treasurer of the corporation a surety bond in the amount of One Thousand Dollars ($1,000) to guarantee the payment of any or all freight charges due the corporation from the member. Such bond must be immediately increased to cover the average outstanding charges due the corporation whenever such outstanding charges exceed One Thousand Dollars ($1,000) and the member is so advised by the treasurer of the corporation.

ARTICLE XVI.—AMENDMENTS

These By-Laws may be altered, amended or repealed in whole or in part and new By-Laws may be adopted by a majority of the trustees present at any regular meeting or at any special meeting called for that purpose, if at least ten (10) days' written notice is given of intention to alter, amend or repeal or to adopt new By-Laws at such meeting.

APPENDIX C

Contract

THIS AGREEMENT, made and entered into this 25th day of August, 1961, by and between PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC., a nonprofit corporation, having its main office in Seattle, Wash., hereinafter called the "Association," and FRANK KELLEY, of Seattle, Wash., doing business as OLYMPIC TRAFFIC SERVICE, hereinafter called the "Manager." The parties mutually agree as follows:

1. The Association hereby employs the Manager, and the Manager hereby enters into the employ of the Association as its Manager. The Manager shall have only such power and authority as is delegated to him by the board of trustees of the Association.

2. In return for the compensation herein specified the Manager will perform all the administrative work of the Association, including the making of billings to members, collection and receipt of payments, disbursement of funds in payment of transportation, storage and handling charges, and other obligations incurred by the Association, and will provide personnel to handle the routing, day-to-day traffic problems of the Association, furnish office space and the necessary office equipment, office supplies, postage, freight bills and telephone expense (not including long distance charges) and automobile expense.

3. The Manager shall receive as compensation for the services and expenditures specified in paragraph 2 hereof the sum of thirty-three cents (33¢) per hundredweight of all shipments handled by the Association. This figure may be adjusted upon mutual agreement of the parties.

4. It is understood by the parties that this agreement relates only to the Manager's compensation from the commencement of actual operations on July 17, 1961, and that Kelley is entitled to additional compensation for his

services to and for the Association during its organizational period.

5. It is understood by the Association that FRANK KELLEY, doing business as OLYMPIC TRAFFIC SERVICE, also engages in other traffic consulting activities and will not devote all his time, attention and energies to Association matters.

6. If the Manager shall be neglectful of the interest of the Association or shall manage its affairs badly or in an improper way, or shall misconduct himself, the Association may, at its option, terminate this agreement on 45 days' notice to the Manager; however, in the absence of such cause this agreement shall not be terminated by the Association prior to August 1, 1963. The Manager may terminate his service to the Association on 45 days' notice.

7. Without further approval of the Association's board of trustees, the Manager may assign his interests in this agreement to any corporation of which FRANK KELLEY is the majority shareholder, such assignment to be effective only so long as KELLEY remains the majority shareholder and continues to devote a substantial portion of his personal time and energies to Association matters.

KELLEY's interest in this agreement may be assigned to another person or corporation of which he is not majority shareholder only with the approval of the Association's board of trustees.

8. The Manager shall keep complete and accurate books of account and a record of all transactions and shall report periodically as requested by the Association's board of trustees.

9. The Association will pay the premium of such fidelity bond or bonds as it requires of the Manager or his employees; such bond or bonds shall remain in force in

such amount as the Association may from time to time require and in the event such bond is refused the Manager, or is ever canceled, except with the approval of the Association, the Manager's employment shall be immediately terminated.

DATED the day and year first above written.

(Signature)

Frank Kelley

PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC.

By .....

Karl Iverson, President

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

Case No. 65-1431-IH

NORTH AMERICAN CAR CORPORATION, ETC., ET AL.,
Plaintiffs,

v.

UNITED STATES RUBBER CO., ETC., ET AL.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California
Date: Monday, May 8, 1967

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Telephone: 624-2928

APPEARANCES:

For the Plaintiffs:

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By: ROBERT A. SMITH, ESQ.

For the Defendants United States Rubber Co. and Star-Kist Foods, Inc.:

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By: SIDNEY H. WALL, ESQ.
LAUREN M. WRIGHT, ESQ.

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904 North LaBrea
Inglewood, California

For the Defendant Robin Zippers, Inc.:

SEYMOUR MANDEL, ESQ.
4041 Marlton Avenue, Suite 260
Los Angeles, California 90008

* * * *

[5] what this is all about to go through everything you have stated in your documents.

If you have anything additionally to add by way of argument, or even perhaps authority that has not been cited in your papers, I will certainly hear you on that.

And if you want to re-emphasize briefly some of the matters that are contained in your motion papers and in your resistance to the motions, of course I will not foreclose you from so briefly emphasizing or summarizing your position.

I think we will hear from respondent first. Now, you might, Mr. Smith, go over these counts and treat them separately and tell us, among other things, what you regard to be the essence, the gravamen of each of these counts.

MR. SMITH: I will be happy to do that, your Honor. And with the court's comments in mind, I would like first to start with a brief review, not all of the facts, but of

some of the facts which I feel are critical to plaintiffs' case.

First of all, I would like to comment on the distinction which exists between regulated freight forwarders and unregulated shipping associations.

THE COURT: Well, I am certainly familiar [6] now with the statutory pattern. And if I hadn't read the statutes, the briefs labor that at quite some length. The differences, as far as I can see, are not in dispute between you gentlemen.

MR. SMITH: That's correct, your Honor.

THE COURT: Go ahead.

MR. SMITH: In that connection, it will suffice, I think, for me to re-emphasize the matter of the exhaustive financial regulations which are contained in the Code of Federal Regulations. In the brief I mentioned that there are some 30 pages of fine print detailing the financial requirements which a regulated freight forwarder has got to comply with; all of this by way of emphasizing that the Interstate Commerce Commission's concern that regulated freight forwarders be financially and fiscally sound. And this adds, I think, to our contention that the Interstate Commerce Commission, as a part of the national transportation policy, insists that to escape federal regulation and be an exempt shipping association, the policy is that members must assume both control of the operations and responsibility for the major financial risks of the company.

And the other factual point I would like to mention before talking about the theories as such, [7] your Honor, is that it is quite plain from the Interstate Commerce Commission decision that CSA attempted to have the benefit of an exempt status without being willing to take the burden of that same position; and they did so in three ways, by performing services for the general public and not limiting membership to an exclusive list of customers, but rather being very non-selective about proselytizing potential members.

THE COURT: Here you are referring to the ICC findings which are attached to your complaint, are you not?

MR. SMITH: Well, I think I am also referring to paragraph 16 of the complaint, your Honor, which alleges these facts, as well.

THE COURT: Yes. But a lot of factual detail underlying such allegations are in those ICC findings.

MR. SMITH: Yes, that is correct. Secondly, CSA did not perform its services on a non-profit basis, which it was required to do, because it in fact set its rates arbitrarily, not based upon cost, but just based upon a figure less than freight charged by freight forwarders, which in fact allowed CSA to make a profit. Which was then siphoned off by the Shulmans. And that also is in the ICC decision.

[8] And then, finally, on two occasions, amending the by-laws and articles to attempt to insulate themselves from personal liability.

THE COURT: Well, I would like to stop with that for a moment. It appears, does it not, at one time the ICC may have thought about or even imposed an interpretation of the statute permitting exemption as requiring personal liability.

But it now appears, does it not, that the agency itself agrees that any such interpretation was illegal and beyond its jurisdiction.

MR. SMITH: Well, your Honor, it has to do with the extent of such liability. And counsel make the same point as the court makes. They say it can't be said that there was any fixed federal policy here.

THE COURT: As a matter of fact, has not the agency said in so many words in that decision, Atlanta Shippers, that personal liability is not a requisite for the exemption.

MR. SMITH: It said that partnership liability was not a requisite. And to that extent it reversed the prior finding of Division 1. But at the same time it was clear

to set forth that as a minimum requirement the members must assume the basic [9] financial risks. And that is a direct quotation from the Atlanta Shippers decision.

In other words, the controversy was between an absolute standard of liability, partnership liability, and something less. But that "something less," and it's never been less than that, is certainly sufficient to embrace the debts sued upon in this action.

THE COURT: Well, what is the requirement for exemption as now interpreted by the ICC, as you understand it?

MR. SMITH: It is that the members of the association must assume control of the entity and the major financial risks.

THE COURT: Now, what does that mean on the question of whether the members must assume personal responsibility?

MR. SMITH: Well, I would like to quote the decision in full, your Honor, or at least on this particular point, because I think the Commission is very exact on what it is insisting upon. Exhibit 3, pages 18 and 19 of the decision, your Honor.

THE COURT: Go ahead. You may read it.

MR. SMITH: The Commission says:

> "To the extent, however, that the prior report of Division 1 may be said to have [10] imposed upon the association members a joint and several liability, we think the statutory requirements have been exceeded. The presence or absence of such 'partnership' liability on the part of association members does not seem to have been accorded any importance by Congress . . . In this connection, the major financial risk entailed in the conduct of association operations under Section 402(c), other than such risks as are readily insurable, is the risk of loss, or to put it another way, the risk that the savings resulting from the association's use of applicable carload, truckload, or other volume rates, will be eaten up or more than

offset by the association's operating expenses. And so long as this essential transportation burden is, in fact, borne ultimately by the members (rather than by someone else) who exercise effective surveillance over the physical consolidation and distribution operations, it is clear that there has been compliance with the statutory scheme . . ."

[11] Now, the claims of plaintiffs being sued upon in this case, your Honor, are just such claims as would fall under the essential burden of the business that evolves from—

THE COURT: I am having a lot of trouble understanding your position. The ICC appears to have said that there is no joint and several personal liability as a requisite of obtaining the exemption. Haven't they said that?

MR. SMITH: That is correct, your Honor.

THE COURT: What kind of liability is there then, in your view?

MR. SMITH: Well, I don't know, as a matter of law, that we have a concept which embraces the kind of liability the ICC talks about. I don't know what it could be other than an assumption of the debts of the corporation, which means all the debts.

THE COURT: Jointly and severally, is that not correct?

MR. SMITH: Maybe it means a provision in the by-laws, your Honor, saying if need be, the members can be assessed. In one case before the ICC that was enough to entitle a shipping association to exempt status.

Maybe it means that somehow the members [12] have to be reachable. It certainly means, if nothing else, that they cannot attempt to insulate themselves by passing by-law and article provisions as they did in this case.

So there is a requirement that some measure of financial responsibility be assumed. It may not be a legal animal with which we are familiar.

THE COURT: When it gets defendants' turn, please, gentlemen, you will take up your interpretation of what the Commission held, and how to interpret it in Atlanta Shippers.

Go ahead.

MR. SMITH: Your Honor, the Interstate Commerce Commission rendered its finding 14, which was in essence that the members had not agreed to assume either control or financial responsibility, and added the comment, in fact, they have insulated themselves against such liability by insisting on the amendment. It's the purpose of plaintiffs' lawsuit to test out the truth of that proposition, whether indeed such attempt to insulate has been successful.

And certainly the fact that the Interstate Commerce Commission may have been under the impression that such insulation was effective is not binding upon this court.

* * * *

[43] defendants on the motions to dismiss?

MR. WALL: I will volunteer for that assignment, your Honor.

THE COURT: All right, Mr. Wall.

First, what do you say to the argument that the ICC in Atlanta Shippers said something different from what they purport to say about responsibility for debts not being a requisite of the exemption?

MR. WALL: Well, if your Honor please, the Atlanta Shippers case is not crystal-clear to me in the rule that it lays down.

It is clear to me in one respect, and that is that the Commission said in that case that joint and several partnership liability is not required. And that is what I understand the plaintiffs are attempting to enforce in this case here against the defendant members of CSA.

Now, as to just what the ICC did intend to state as the requirement in terms of this financial responsibility, it seems to me that it comes pretty close to being simply an assumption by the members of the association of the

risk that the savings, the anticipated savings that they hope to realize by reason of being a member of an association which could operate on a non-profit basis and ship at lower cost, the risk [44] on the part of the members that that savings might not be realized; that what would otherwise be their savings, anticipated in terms of freight rates, would be eaten up by the costs and expenses of operating the association, which theoretically works on a non-profit basis.

Now, that isn't very clear to me, your Honor.

THE COURT: You mean the risk of loss of whatever capital they put in?

MR. WALL: Yes. The risk of loss of whatever capital they might have put in, and the risk that they might not realize the savings that they hoped to realize.

THE COURT: Could this also mean that maybe they are responsible to the carriers for the higher rate, if it turns out that their entity wasn't qualified for the exemption?

MR. WALL: I do not so read it, your Honor. I do not read the Interstate Commerce Commission's language in the Atlanta Shippers case as purporting to require, as a condition of exemption, that the members be liable for the debts of the association at all. I just don't read that into it.

Now, I think it is true that in the ICC [45] examiner's decision and report regarding the CSA case, the examiner there does seem to talk in terms of something more approaching joint and several liability.

The Atlanta Shippers case, as your Honor will recall, was decided by the full Commission between the time of the examiner's report and the final decision in CSA. So that I take it that to the extent of laying down a rule on this liability requirement the Atlanta Shippers case controls. But I am puzzled a grea deal—we are on our side of the fence—as to just what the Commission meant here.

They attempt to define it. After saying that joint and several partnership liability is not required, then they

say that there must be an assumption of the major financial risk. And they say, "In this connection, the major financial risk entailed in the conduct of association operations under Section 402(c), other than such risks as are readily insurable, is the risk of loss, or to put it another way, the risk that the savings resulting from the association's use of applicable carload, truckload, or other volume rates, will be eaten up or more than offset by the association's operating expenses."

THE COURT: Well, that sure seems consistent with the basic holding that there is no individual [46] responsibility for the debts of the entity on the part of every member.

MR. WALL: It certainly seems that to me. And that, I think, is reinforced by the specific holding of the Commission that joint and several, or partnership liability, is not the requirement.

THE COURT: Well, now, I have been over these documents, as I have indicated. Are there matters that you wish to particularly summarize or reinforce or enumerate?

MR. WALL: I would like, if I may, your Honor, to respond in part to your Honor's question as to who were members at the time when, I believe your Honor put it in terms of the application for exemption was made. And, like Mr. Smith, as I understand, there is no requirement that exemption be applied for. I think what happens is that the corporation is organized and starts business, and doesn't apply for a permit.

THE COURT: I think my question then was probably inept. There is no application, and apparently not even a notice requirement.

MR. WALL: I believe that's right. On the other hand, I believe your Honor's question goes right to the heart of some of the equities in this case, and I would like to point that out in terms of the * * *

* * * *

[53] No. 65-1431-IH

NORTH AMERICAN CAR CORPORATION, ETC., ET AL.,
Plaintiffs,

v.

UNITED STATES RUBBER CO., ETC., ET AL.,
Defendants.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on Monday, May 8, 1967, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of June, 1967.

/s/ Don P. Cram
Official Reporter

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

Case No. 65-1431-IH

NORTH AMERICAN CAR CORPORATION, ETC., ET AL.,
Plaintiffs,

v.

UNITED STATES RUBBER CO., ETC., ET AL.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California
Date: Monday, May 8, 1967

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Los Angeles, California 90008

[3] LOS ANGELES, CALIFORNIA, MONDAY, MAY 8, 1967, 2:00 O'CLOCK P.M.

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* * * *

THE COURT: Gentlemen, I don't require any additional argument on these matters. I want to discuss the motions to dismiss first.

The remarks which I will make in connection with my ruling on these motions are largely extemporaneous, and being of an informal nature, will, perforce, lack full case citations and other refinements of a prepared opinion. They will, however, serve in lieu of an opinion as a statement of the Court's reasons for the actions taken.

Now, we must discuss with respect to this motion to dismiss, each of the counts separately.

The essence of Count One as I read it is that the Defendants, in an effort to take advantage of an exemption

from Regulation under the ICC Act given to non-profit shippers associations with limited memberships, purported to form a non-profit corporation under the California law; that it was formed with the intent that it would be operated so as not to comply with the California non-profit corporation law in that it was intended to be operated for a profit; that the ICC exemption was sought and claimed when Defendants were [4] not entitled to it because they intended to operate so as not to limit their membership. All of this is alleged to be a fraud on the California Corporation Commissioner giving rise to personal liability. There are also some contentions in the complaint in the first count about the amount of capital in relation to the amount of liabilities, but these apply more directly to a later count and will be discussed as part of the alter ego problem raised in a later count. These allegations are regarded as surplusage in an analysis as to whether the first count states a cause of action.

I have determined that the first count does not state a cause of action. The intent to claim and exercise the exemption under the ICC law, even if fraudulent, as alleged, does not give rise to personal civil liability on the part of the principals of the corporation. The holdings of the 9th Circuit in the cases that were mentioned earlier, Consolidated Freightways and Pensick and Gordon, seem clear on that point. Plaintiffs in effect are urging me to disregard those opinions and find the personal liability under the ICC Act despite those holdings.

I agree that those cases were not concerned with liability of principals of a corporation. But they do seem to stand for the proposition that no [5] private civil rights, other than those specifically set forth in the statute, are created by violation of the provisions of the ICC statute.

There is likewise no authority under California law which holds that the incorporation of a corporation as a purported non-profit corporation, when it is not intended for it to be operated in accordance with the provisions

and requirements of the non-profit law of California, gives rise to personal liability on the part of the members of that corporation for its debts. The California authority indicates that no such liability can exist.

It seems clear that if some fraud is practiced on the Secretary of State of California or the California State Corporation Commissioner, and if a corporation is formed for an illegal purpose or otherwise is invalidly chartered, the remedies for such action, except where a remedy is specifically given to a private citizen by some statutory provision, belong exclusively to the State. The State can proceed under criminal provisions and has the right to question the existence of the corporation by quo warranto proceedings.

The California appellate courts have said that quo warranto is the only remedy. Such statements have been made by the California courts in [6] a number of the cases cited in the briefs, among them Dean and the Miller case and the San Ysidro case. For me to hold in the face of such authority that some fraud practiced on California corporate officials gives rise to personal liability for the corporation's debts seems to me a totally unwarranted effort to extend the California law as declared in its state courts.

Parenthentically, it is not even clear that any fraud on California officials is charged. The only misrepresentation that is apparently charged as having been made to such officials is the representation that the corporation was not going to make a profit. This ignores the clear principle that non-profit corporations in California may make a profit on their business transactions so long as their members who are their owners are not entitled to distribution of such profit. But my remarks on this subject have assumed arguendo that fraud was practiced on California officials in obtaining the corporate charter, and even under such assumption there is no legal basis for saying that the result of such fraud and the price of such fraud is personal liability to the entity's creditors.

Now, for the second count. The essence of the second count as I read it is that Defendants, in a scheme to circumvent the restrictions of the ICC Act [7] and to illegally purport to qualify for the exemption under it, substituted a financially irresponsible corporation, with unsubstantial assets, for themselves. As a result, say the Plaintiffs, to refuse to pierce the corporate veil and to refuse to impose personal liability for the corporation's debts—or put another way, as Plaintiffs put it, to "adhere to the fiction of the corporation's separate corporate existence"—would sanction a fraud and promote injustice.

Plaintiffs defend this count as stating a cause of action to impose personal liability under California law under some theory of alter ego or piercing the corporate veil or disregarding the corporate entity. I will come back to dealing with this count in that light in a minute.

It is also my duty, if I find that the offered justification of the count has no merit, to see if the count conceivably can be said to state a good cause of action on any other theory. And I have done that as to the second count, as well as each of the counts involved.

Now, on the second count, in attempting to see if it conceivably can be said to state a good cause of action, it appears to me that there is only one other possibility other than this alter ego or piercing [8] the corporate veil, and that is this: that a scheme to circumvent the ICC Act by falsely claiming an exemption from regulation thereunder, perforce gives rise to personal liability for the corporation's debts on the part of its principals who did the scheming.

Now, I have dealt with that theory already in my discussion of the nature of the ICC Act and the remedies afforded thereunder in my previous discussion of the first count, and I find that on this theory no cause of action is stated in the second count.

Let me then move to the California law under the heading "Piercing the corporation veil", "alter ego" or "disregarding the corporate entity". Now, each of those

phrases, gentlemen, is, in my opinion, a convenient phrase to describe a result, i.e., holding the principals for the obligations incurred by a corporate entity.

Now, Plaintiffs would have me believe, and they argue in their brief, that there are two different theories and doctrines, under California law, with different requisites. First, an "alter ego" theory and, second, what they call "disregarding the corporate entity". No California authority has been cited to me which defines these as different theories of liability with different requisites.

[9] As to "alter ego" this second count is plainly deficient. The Supreme Court of California has stated in Automatriz, and in other cases, that there are two essentials that are required to be shown before personal liability can be imposed; (1) unity of interest and ownership; and (2) injustice or unfairness. This count totally lacks an allegation of unity of interest and ownership, and Plaintiffs have been candid enough to admit in argument that if such an allegation is required, they cannot in good faith make such an allegation. The count could be dismissed on that ground alone; and is so dismissed.

The Plaintiffs' whole thrust of argument as to this count is that liability may be imposed despite the lack of unity of interest and ownership. And in coming to the result I have had to investigate what is meant by unity of interest and ownership.

Witkin says this phrase means that it must be shown that the corporation was "dominated or controlled" by those against whom personal liability is asserted. That is found at 3 Witkin, in the Summary of California Law at page 2304. Or, as stated by the California Supreme Court in that Minifie case, it must be shown "first, that the corporation is influenced and governed by that person (and also) that there is such a unity of [10] interest and ownership that the individuality or separateness of the person and corporation has ceased."

So this requirement of unity of interest and ownership concentrates on whether the corporation was dominated,

controlled, influenced and governed by the person or persons upon whom its debts are now sought to be imposed.

It seems to me clear that such a showing has not and cannot be made by Plaintiffs, as they themselves concede.

The ICC examiner's report and decision are incorporated by Plaintiffs in their complaint, with a statement that they are final and conclusive and binding on this court. And that report and ICC decision deals with who did dominate, control, influence and govern this corporation. It seems abundantly clear from that report that it was dominated, controlled, influenced and governed by the Shulman Group. It certainly appears that none of the named defendants nor any member other than the Shulman Group could be said to have the requisite control to meet this requirement of unity of interest and ownership.

I come now to Plaintiffs' argument that there are two separate doctrines of California law, one called "alter ego" and the other called "disregard of [11] the corporate entity". Plaintiffs claim that the unity requirement is imposed only in alter ego cases and not in the other type. I simply do not agree with their analysis of the law. Plaintiffs are frank enough to say that there are no holdings in California to support this distinction and contention. They base their argument on some language in certain California opinions which they cite at pages 45 to 47 of their brief. I do not read those cases as showing an intention of the California courts, even in dicta, to eliminate the unity requirement.

I have, therefore, determined to grant the motions to dismiss the second count.

Now, we come to the third count. The essence of the third count is that Defendants represented CSA to be an exempt shipping association and that such representation carried with it a representation to creditors of CSA that the members were presonally liable for its debts. Plaintiffs admit in their brief, and their counsel has admitted already, that no claim of fraud on the part of these Defendants is made. Plaintiffs have worded this third count

carefully, and it is important to note that they do not claim that any Defendant specifically represented to any creditor that it would guarantee, or would otherwise be responsible [12] for, the corporation's debts.

The whole basis for this third count is the contention that there could be no exemption unless the members were personally responsible, and thus when Defendants formed a corporation which claimed the ICC exemption the effort to qualify for the exemption was tantamount to affirmative representations that they would be so responsible.

This count must likewise be dismissed. It seems abundantly clear to me that if the ICC ever so interpreted the Act so as to make an attempted qualification for the exemption depend upon personal liability, it no longer so interprets it. In fact, in Atlanta Shippers the ICC has said that personal liability is not a requisite or a requirement for securing the exemption—certainly not the type of joint and several personal liability sought to be asserted here.

Surely I cannot now hold, as a matter of law, that the effort of those Defendants to qualify their corporation for the exemption contained an implicit promise to be personally liable, which implicit promise rests solely on their effort at qualification. If I interpreted this count as stating a good cause of action, I would have to impose liability based upon an alleged attribute or an alleged element of qualification [13] which the administrative agency has now agreed was illegal and beyond its jurisdiction.

Of course, we could have a case in which a member of a corporation expressly and clearly guaranteed a corporation's obligation under a mistaken belief that it was necessary for the individual to guarantee the obligations in order for that corporation to qualify for some special privilege or benefit. But that is not this case, as Plaintiffs concede. There is no claim here that any Defendant expressly guaranteed any obligation.

We now come to the fourth count. The gist of the fourth count is the allegation that no permit from the Califor-

nia Corporation Commissioner was applied for or obtained for the issuance of these membership certificates in CSA. Thus, say Plaintiffs, the purported membership certificates were void, and by reason of their being void the members never achieved limited liability and the corporation must be treated as their agent. And then, say Plaintiffs, in constructing this argument, every principal is responsible for the debts of its agent so, ergo, every member is responsible for the debts of this corporation.

Now, in analyzing this fourth count, it is either (1) an attempt to impose personal liability [14] solely by virtue of the lack of a California permit, or (2) another way of stating a purported cause of action under the alter ego or piercing the corporation veil doctrine. I will discuss it on both bases; although Mr. Smith today stated that it was very closely allied to, and probably another way of, stating an alter ego or piercing the corporate veil concept.

Now, Plaintiffs' briefs appear to assert the proposition that whenever there is no valid permit for stock, the principals of a corporation are liable for its debts for that reason, and that reason alone. The California Corporations Code does characterize stock issued without a permit as void. But there is no authority whatever, as Plaintiffs admit, holding that the consequence of issuing void certificates is personal liability for the corporation's debts. What authority there is seems contra. The California courts have said, as Defendants point out, that third parties, including creditors, cannot challenge the validity of purported stock which has been issued. And one case that I think is especially in point is the Pores case which Defendants have cited.

The Pores case involved an effort by creditors to impose personal liability on the ground that purported stock which had been issued was invalid for [15] failure to comply with permit requirements, just as Plaintiffs urge here. The holding refuses to impose such personal liability on the ground that outsiders, including creditors, cannot

question the stock issuance transaction because they are not damaged by failure to comply with the corporate securities requirements.

Defendants make the same argument here. To it Plaintiffs reply that they, the Plaintiffs, are damaged in the instant case because, if a permit had been applied for, it might not have been issued and, therefore, they would not have started business and, therefore, the corporation would not have incurred the obligations to Plaintiffs and, therefore, Plaintiffs wouldn't have lost their money.

Now, that line of argument, though ingenious, is not persuasive and could be made in every case where there is a failure to comply with the corporate securities provisions.

When Plaintiffs claim that when void stock is issued the corporation must be treated as the agent of the principal, there is simply no authority whatever to support such a theory.

As I read the California law, it is clear that the failure to obtain a valid permit or the failure to issue stock clearly does not, for that reason alone, [16] impose any personal liability on the principals. At most, those facts are factors that will be considered as part of the factual picture under the alter ego doctrine. Therefore, the fourth count, like the second, must be viewed for the purposes of this motion as an alter ego cause of action.

As I stated in my discussion of the second count, the fourth count also fails as stating a cause of action because it lacks an indispensable allegation, to-wit, the unity of interest and ownership.

So, gentlemen, all four counts, and the action, will be dismissed. The dismissal will be deemed an adjudication on the merits on all counts.

The Court apprehends, as conceded by Plaintiffs today, that no purpose would be served by granting further leave to amend since the facts are quite clearly and fully stated in their complaint, and the issues raised in this motion are issues of law.

Now, as to the motion for summary judgment, that will be submitted and I will advise counsel later about it. It may be that I will take no action upon it on the ground that, by the Court's action of dismissing all counts, it is moot. Or, it may be that I will decide it on its merits. I don't know yet.

[17] If I decide it on its merits, my decision thereon will be deemed to have been made before my decision granting the dismissals of the other counts.

Now, let me hear from Defendants as to what form of an order is required for the dismissal under the motions to dismiss. In view of the fullness of my remarks this afternoon, I doubt if it is necessary to do much in the way of stating detailed reasons or citing detailed authorities.

But I will listen if you have some different idea, Mr. Wall.

MR. WALL: Well, I think, your Honor, that certainly the remarks of your Honor this afternoon would completely fulfill the requirement that the reasons be stated. And I think there is such a requirement.

As to exactly the form which the order should take, I am not sure I have the answer at my fingertips.

If we may, we will have the reporter prepare a transcript of your Honor's statement in granting the motions.

THE COURT: Surely, you may.

MR. WALL: It may be that with that statement a simple order of dismissal will be all that is needed. I would like to consider that.

[18] THE COURT: Give that some thought, if you will, please, Mr. Wall. It may take a little while to get this transcript from Mr. Cram. I don't know what his schedule is.

MR. WALL: This case has proceeded at a rather pedestrian pace thus far, and I don't think a little further delay will be harmful.

THE COURT: I would like to have you decide upon and submit for approval as to form an order of dismissal,

hopefully within the next two weeks—well, at the earliest possible moment.

MR. WALL: I am sure we can do that, your Honor.

THE COURT: I will let you devise what form you think best after consultation with other defense counsel.

MR. WALL: Very well, your Honor.

THE COURT: But I don't promise to adopt such form as you do submit to me.

My present thinking, and I think I have indicated it to you, is that with the reasons fully stated, a very short brief order of dismissal would suffice.

MR. WALL: Perhaps referring to the statement of reasons that your Honor has given.

[19] THE COURT: Yes. And the transcript perhaps can be incorporated by reference, and the original of that transcript filed in the court file.

MR. WALL: Yes. I think that is a good suggestion, your Honor.

THE COURT: Very well.

MR. WALL: There is one question, if I may, your Honor.

THE COURT: Yes.

MR. WALL: I am not quite sure about the matter of leave to amend. Did I understand your Honor to say that you are not granting leave to amend?

THE COURT: That is correct. And I have indicated why. Because I do not believe that leave to amend would be useful or beneficial or result in stating any facts which could change the result.

MR. SMITH: Your Honor, I will be happy to stipulate on the record that the Plaintiffs do not desire permission to amend and will stand on the pleadings.

THE COURT: Very well. That poses the legal problem squarely on the present complaint and motion.

MR. WALL: That satisfies my point entirely, your Honor.

[20] MR. SMITH: And I will further be willing to stipulate, your Honor, that, if the court pleases, his re-

marks may be made a part of the official record of these proceedings.

THE COURT: Well, that is what we really have been discussing. The original of the transcript will be filed; and in the event of the matter going further, I would expect the record to include the Court's remarks, and the appellant party to have the duty to see that they are so included.

MR. WALL: Yes, your Honor.

MR. SMITH: Thank you, your Honor.

THE COURT: All right, gentlemen.

MR. WALL: Thank you, your Honor, very much.

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[21]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 65-1431-IH

NORTH AMERICAN CAR CORPORATION, ETC., ET AL.,
Plaintiffs,

v.

UNITED STATES RUBBER CO., ETC., ET AL.,
Defendants.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on Monday, May 8, 1967, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of May, 1967.

/s/ Don P. Cram
Official Reporter

Office-Supreme Court, U.S.
FILED
AUG 28 1968
JOHN F. DAVIS, CLERK

No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., COMMON CARRIER CONFERENCE-IRREGULAR ROUTE, AND REGULAR COMMON CARRIER CONFERENCE,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC. AND AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 355

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vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC. AND AMERICAN INSTITUTE FOR SHIPPERS' ASSOCIATIONS, INC.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

---

MOTION TO AFFIRM

Appellee, American Institute for Shippers' Associations, Inc. (AISA), hereby moves to affirm the judgment of the District Court on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINIONS BELOW

The decision of the United States District Court for the District of Columbia is unreported. Said decision and

the Court's subsequent judgment are printed in the "Appendix to Jurisdictional Statement" at pages 4-7 thereof. The order of the Interstate Commerce Commission and the decision of the Hearing Examiner are reported at 105 M.C.C. 199, and are printed at pages 8-102 of the "Appendix to Jurisdictional Statement."

JURISDICTION

Appellants seek to invoke the jurisdiction of this Court under 28 U.S.C. §§ 1253 and 2101(b).

STATUTES INVOLVED

Statutes involved are set forth at pages 1-3 of the "Appendix to Jurisdictional Statement." [1]

QUESTION PRESENTED

The questions presented by Appellants are inaccurate and misleading. Based upon the decisions below the question before this Court fairly may be stated as follows:

Whether the District Court properly found that the decision of the Interstate Commerce Commission was supported by substantial evidence.

STATEMENT

Appellee AISA is a national trade organization for shippers' associations, and as one of its stated purposes, acts as representative and spokesman for its members in judicial proceedings involving issues affecting shippers' associations. Through 49 members, AISA speaks for in excess of 1500 shippers, including manufacturers and retailers, who have joined shippers' associations in order to obtain freight transportation at the lowest possible cost by

[1] Hereinafter, AISA will refer to the "Appendix to Jurisdictional Statement" as "App. ——."

lawful means and methods. Generally, shippers' associations arrange for the interstate movement of their members' freight, on a nonprofit basis, and in so doing, secure economical transportation by taking advantage of carload, truckload, or volume rates. Utilizing the services of rail and motor carriers operating in interstate commerce, each association arranges for the assembly and consolidation of property, movement of such property, and breakbulk and distribution of the consolidated shipments. Shippers' associations operating in such manner are excluded from regulation under Part IV of the Interstate Commerce Act,[2] by the provisions of 49 U.S.C. § 1002(c)(1). In a decision affirmed by this Court, *Baltimore Shippers and Receivers Association, Inc.*, v. *Public Utilities Commission of California*, 268 F. Supp. 836 (N.D. Cal. 1967), *aff'd.* 389 U.S. 583 (1968), the District Court declared:

> The language of 49 U.S.C. § 1002(c)(1) indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation. (268 F. Supp. at 844)

To bolster their patently weak position, Appellants have set forth a statement of the case which is factually inaccurate and self-serving. Appellee AISA hereby adopts the objective Statement of Appellees United States and Interstate Commerce Commission.

THE QUESTIONS ARE UNSUBSTANTIAL AND DO NOT WARRANT FURTHER ARGUMENT

Appellants raise three basic points in support of their position that the questions are substantial. "Reasons" cited by Appellants in urging this Court to consider the merits of the case have no basis in fact or law. Appellee AISA treats each of these reasons *seriatim*.

1. This appeal does not bring questions of first impression to this Court as Appellants claim. As early as 1911,

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[2] 49 U.S.C. §§ 1001-1022.

this Court recognized the place of shippers' associations in the national transportation system, the operations of these associations, and the distinction between these associations and freight forwarders. In *Interstate Commerce Commission* v. *Delaware, Lackawanna, & Western Railroad Co.*, 220 U.S. 235 (1911), this Court said:

> There can be no doubt that the privilege of shipping at a lesser rate for the carload shipment than was asked for a less-than-carload shipment came to be interwoven with and inseparable from the movement of commerce through the channels of railroad transportation. And the benefits of the lesser rate came to be obtained not alone by an owner of all the goods shipped in a carload, but by combinations of owners, by agreements between them concerning particular and isolated shipments, by the organization of associations of shippers having for their object the creating of agencies to receive merchandise belonging to the members of the association, and to aggregate and ship them in carload lots in the name of one consigner to a single consignee, at one destination, by the use of commission houses, storage and other companies, etc. (220 U.S. at 242-243)

This Court went on to distinguish the operations of the freight forwarder in stating:

> It is also undoubted that, in consequence of the facility of shipping at a lesser rate for a carload than for a less-than-carload shipment, there developed a class of persons known as forwarding agents, who embarked in the business of obtaining a carload rate for various owners of merchandise by aggregating their shipments, such agents relying for their compensation upon what they could make from the difference between the carload and less-than-carload rate. (220 U.S. at 243)

In *United States* v. *Pacific Coast Wholesalers' Ass'n.*, 338 U.S. 689 (1950), this Court had placed before it the operations of a shippers' association not unlike in struc-

ture to the Appellee association under attack here.[3] In determining under 49 U.S.C. § 1002(c)(1) that the Association in *Pacific Coast* was not in violation of the Interstate Commerce Act, this Court set the standard for determining the status of shippers' associations, stating: "On the contrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative [by Congress]. Under that test, the valid claim to the statutory exemption is established by the original Commission decision." (338 U.S. at 691).

2. The Commission decision does not confuse or obliterate the distinction between shippers' associations and freight forwarders as Appellants claim. The Commission's decision is articulate in setting forth the applicable statutes, the applicable precedents, sufficient findings and sufficient conclusions. Thus, in essence, Appellants here are attempting to attack *factual* findings and conclusions drawn therefrom. This plainly is not a matter which raises a substantial issue in this Court. The issue, whether substantial evidence support the Commission's findings, has been decided by the District Court and no longer is judicially reviewable. *National Labor Relations Board* v. *Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962).

3. Appellants attempt to substantiate the issues by claiming that shippers' associations are inimical to the common carrier and the national transportation system, and as such, should be curtailed. Such a claim has no relevance to the facts in this case,[4] nor is it factually or legally correct. *Rather than siphoning off freight from common carriers, shippers' associations have created and provided freight for both railroads and motor carriers.* This is evident from the nature of association operations. See, *e.g. Interstate Commerce Commission* v. *Delaware,*

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[3] The association in *Pacific Coast* was a corporation.

[4] Various "studies" cited by Appellants (J.S. 12-15) have no materiality here. These studies are not of record and their accuracy never has been tested.

Lackawanna, & Western Railroad Co., 220 U.S. 235 (1911); *Interstate Commerce Commission* v. *Chicago Food Mfrs. Pool Car Group*, 39 F. Supp. 283 (N.D. Ill. 1941); *National Motor Freight Traffic Association, Inc.* v. *New Hampshire Shippers Cooperative, Inc.*, 323 I.C.C. 658 (1964); *National Motor Freight Traffic Association, Inc.* v. *Baltimore Shippers and Receivers Cooperative*, 323 I.C.C. 775 (1964); *Mueller Contract Carrier Application*, 41 M.C.C. 295 (1942). As early as 1908 the Interstate Commerce Commission recognized that shippers' associations have "developed an immense volume of traffic which otherwise could never have been brought into being." *California Commercial Association* v. *Wells, Fargo & Co.*, 14 I.C.C. 422, 433-434 (1908).

Recently, in *Baltimore Shippers and Receivers Association, Inc.* v. *Public Utilities Commission of California*, 268 F. Supp. 836 (N.D. Calif. 1967), *aff'd.*, 389 U.S. 583 (1968), the controversy centered around the authority of a State to subject to rate regulation interstate motor carriers serving shippers' associations within commercial zones. In resolving the issue in favor of shippers' associations similar to the association under attack here, the District Court reasoned that Section 402(c) of the Interstate Commerce Act "indicates that nonprofit shippers' associations enjoy a preferred status within the scheme of national transportation." (268 F. Supp at 844). The Court further emphasized: "It is clear that the statute recognizes a benefit and endorses that benefit by exemption and that part of the benefit is in the distribution process." (268 F. Supp. at 844).

THE DISTRICT COURT AND THE COMMISSION PROPERLY CONCLUDED ON THE RECORD THAT PACIFIC PROGRESS SHIPPERS ASSOCIATION WAS EXCLUDED FROM REGULATION UNDER SECTION 402(c)(1) OF THE INTERSTATE COMMERCE ACT

In *Atlanta Shippers Association, Inc.—Investigation*, 322 I.C.C. 273 (1964), the Commission held that to come within the exclusion of Section 402(c)(1), 49 U.S.C.

§ 1002(c)(1), a shippers' association through its members must not only control the association operations, but must, in addition, bear the essential risks of the operation under consideration. In citing *United States* v. *Drum*, 368 U.S. 370 (1962), Appellants disregard the "control" issue. In *Drum*, this Court recognized the materiality of the "essential risk" question in determining the legality of a private carrier operation. While application of the *Drum* case to shippers' associations is improper because of the totally different operations of private motor carriers there involved, and nonprofit shippers' associations here involved, we do not necessarily disagree with the application of the "test of substance." The point is to be made clear, however, that the Commission's test of control set forth in *Atlanta Shippers* is extremely important and is in accord with the Commission's interpretation of *Drum*. In the subsequent case of *Lovell—Investigation of Operations*, 92 M.C.C. 728 (1963), the Commission concluded:

> The Court in the *Drum* case did not conclude that the Commission must *abandon* consideration of control in favor of a 'characteristic burden of transportation test,' but only held that the Commission may and has *supplemented* its 'control' test with other factors, thus demonstrating that, in essence, the test is one of substance involving an evaluation of all relevant factors. (92 M.C.C. at 736, emphasis in original, footnote omitted)

Appellants completely abandon the control issue in their presentation of arguments to this Court, and, by so doing, concede that no one other than the shipper members of the involved association have any right or ability to control, direct, or dominate the association operations.

Appellants incorrectly claim that the association under attack has not met the standard that the shipper members must bear the essential risks and burdens, financial and otherwise, of conducting the operations. In explaining this standard, the Commission said in *Atlanta Shippers*:

> To the extent, however, that the prior report of division 1 may be said to have imposed upon the association members a joint and several liability, we think the statutory requirements have been exceeded. The presence or absence of such "partnership" liability on the part of association members does not seem to have been accorded any importance by Congress in the overall scheme of forwarder regulation and will be given none here. In this connection, the major financial risk entailed in the conduct of association operations under section 402(c), other than such risks as are readily insurable, is the risk of loss, or to put it another way, the risk that the savings resulting from the association's use of applicable carload, truckload, or other volume rates, will be eaten up or more than offset by the association's operating expenses. And so long as this essential transportation burden is, in fact, borne ultimately by the members (rather than by someone else) who exercise effective surveillance over the physical consolidation and distribution operations, it is clear that there has been compliance with the statutory scheme. Accordingly, we are constrained to reject expressly this aspect of the division's decisions herein (322 I.C.C. at 285).

This language of the Commission was specifically approved by the District Court in *Freight Forwarders Institute* v. *United States*, 263 F. Supp. 460 (S.D.N.Y. 1967). In commenting upon the same arguments raised here by Appellants that Court stated:

> We agree with the Commission that it is sufficient that these risks *not* be borne by any party *other than the shipper association itself*, whatever its limitations on individual member liability, as long as the members in good faith exercise responsible control over their association's operations. (263 F. Supp. at 465, emphasis supplied.)

In the instant case the record fully supports the Commission's finding that no one other than Pacific Progress

Shippers Association and its members assumed the essential transportation burden or the risk that the savings resulting from the association's use of volume rates would be eaten up or more than offset by the association's operating expenses.

Appellants make much of the fact that associations are organized in the corporate form. Historically, however, shippers' associations have operated in such manner. See *Interstate Commerce Commission* v. *Delaware, Lackawanna, & Western Railroad Co.*, 220 U.S. 235 (1911). Moreover, at the legislative hearings from which 49 U.S.C. § 1002(c)(1) emanated, associations which testified were incorporated. *Hearings on H.R. 3684 Before the Committee on Interstate and Foreign Commerce*, 77th Cong. 1st Sess. 382, 389, 497 (1941). Congress, therefore, was fully aware of incorporated associations, and acknowledged the acceptability of the corporate form by passage of 49 U.S.C. § 1002(c)(1). There is nothing in the Act, its legislative history, or judicial interpretation thereof which even remotely suggests that incorporation is an impediment to the functioning of a shippers' association, or incompatible with 49 U.S.C. § 1002(c)(1). As stated by the Commission in *Atlanta Shippers*:

> * * * Congress did not intend that shippers must avoid use of the corporate form in conducting operations which otherwise would be clearly those of a nonprofit group or association of shippers within the meaning of section 402(c) of the act. (322 I.C.C. at 287)

Finally, this Court found an association to be entitled to the exclusion under 49 U.S.C. § 1002(c)(1) notwithstanding the fact that it was incorporated. *United States* v. *Pacific Coast Wholesalers Ass'n.*, 338 U.S. 689 (1950).

Profit-minded freight forwarders are regulated by the Commission under Part IV of the Interstate Commerce Act. These freight forwarders and nonprofit shippers' associations perform nearly identical physical functions.

There is absolutely no reason for injuring the shippers' association to the benefit of the freight forwarders by a strained interpretation of statutory standards as Appellants urge. In *Baltimore Shippers and Receivers Association, Inc.* v. *Public Utilities Commission of California, supra*, the Court held:

> Freight forwarders and non-profit shippers' associations perform nearly identical functions, except for the fact that the freight forwarders hold themselves out to do business with the public, rather than providing services only for members of an association, and they operate at a profit rather than as a non-profit service to members. (268 F. Supp. at 840)

Further, the Court commented;

> The language of 49 U.S.C. § 1002(c)(1) indicates that non-profit shippers' associations enjoy a preferred status within the scheme of national transportation. The exemption is made applicable to ". . . the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates . . . ." It is clear that the statute recognizes a benefit and endorses that benefit by exemption and that part of the benefit is in the distribution process. (268 F. Supp. at 844)

If, as the Court stated, and this Court affirmed, shippers' associations enjoy a preferred status under the Interstate Commerce Act, it would be contrary to "the scheme of national transportation" if artificial restrictions were placed upon the operations of shippers' associations. It thus is submitted that the Court below properly affirmed the Interstate Commerce Commission's conclusion that Appellants' complaint against Pacific Progress Shippers Association, Inc. should be dismissed.

THE DECISIONS OF THE COMMISSION AND DISTRICT COURT FULLY COMPLIED WITH SECTIONS 557 AND 706 OF THE ADMINISTRATIVE PROCEDURE ACT, RESPECTIVELY

The Commission Examiner made detailed findings and conclusions with respect to all contested issues, thus meeting his responsibilities under Section 557 of the Administrative Procedure Act (5 U.S.C. § 557). For example, as to the "financial responsibility" issue, the principal question raised by Appellants (J.S. 3), the Examiner *found, inter alia*: "Members are responsible for the payment of prepaid shipments if the consignor fails to pay." (App. 30); "It cannot be concluded from the example cited that the assistance rendered by the Association to its claimant member is tantamount to the processing of a loss and damage claim in contravention of article XIII of the By-Laws * * * In both of these circumstances, the witness admits, on cross-examination, that the Association did not pay any of these claims and acted only as an intermediary." (App. 45-46); ". . . the members were assessed the lawful tariff rate for a period of 3 months in order to recoup some of these losses." (App. 46).

Based upon an exhaustive consideration of the evidence and applicable legal principles, the Examiner *concluded, inter alia*: "Applying these elements to the facts in this record, it has not been shown that Pacific's operations include all of the essential functions of freight forwarding, or that this Association assumes responsibility for the transportation of members' shipments from point of receipt to point of destination. The evidence shows that the Association does no more than provide a transportation service for its members on a nonprofit basis." (App. 82-83). The Examiner further concluded:

> In light of the foregoing discussion and an analysis of all the evidence in the record, the Examiner concludes that the traffic handled by the defendant Association is for the members thereof; that the Association has been operated in good faith for the purpose

> of effecting savings in freight charges for its members by securing the benefits of carload, truckload, or other volume rates, and that it is operated on a nonprofit basis as contemplated by the exempt provisions of section 402(c)(1) and (2), and that none of the defendants herein is engaging in services as freight forwarders within the meaning of section 402(a)(5) of the act. (App. 89-90)

The Court's statement in *Texas Mexican Railway Co.* v. *United States*, 250 F. Supp. 946, 950 (S.D.Tex. 1966), is fully applicable here:

> A careful review of the record made in these proceedings convinces us that the findings and conclusions of the Examiner are supported by substantial evidence. They are attacked here by Plaintiffs on various grounds, but we cannot say that they are arbitrary, unsupported or inadequate.

By a unanimous order of its Division 1, the Commission upheld the Examiner's decision. Finding that the exceptions and replies of Appellant raised no new or material matters of fact or law not adequately considered and properly disposed of by the Examiner, the Commission adopted as its own the Examiner's report. Appellants claim that the additional citation by the Commission of two of its cases rendered such disposition illegal under Section 557 of the APA. The obvious absurdity of such a contention has heretofore been exposed. In *Younger Brothers* v. *United States*, 238 F. Supp. 859, 861 (S.D. Tex. 1965), the Court stated:

> This leaves only the tag end contention that in its disposition of the case, the Commission failed to comply with the requirement of § 8(b), 5 U.S.C.A. § 1007(b) of the APA, that the order reflect the reasons and basis for the findings and conclusions. If this is a claim that Division 1, otherwise fully satisfied with Examiner's Report, has to go through the laborious process of issuing its own decision-report, it quickly fails.

And in *T.S.C. Motor Freight Lines, Inc.* v. *United States*, 186 F. Supp. 777, 787 (S.D.Tex. 1960), the Court held as to an argument similar to that advanced by Appellants:

> The Administrative Procedure Act does not require that detailed findings with supporting reasons previously made and adhered to by the Commission be reiterated after each attack. The statement by the Commission that the 'findings of the Commission [are] in accordance with the evidence and the applicable law' is obviously a statement that the Commission is standing behind the original detailed and articulate findings and conclusions. The law requires no more.

The Commission's reliance upon the Examiner's decision here thus was proper under settled judicial construction of Section 557 of the APA.

Appellants further contend, however, that the District Court failed "to perform its duty under Section 706 of the" APA, "by deciding the relevant questions of law before it on appeal of the Commission's order." (J.S. 37) Essentially, Appellants argue that the District Court erred by affirming the Commission "on the basis of 'direct consideration of the statute itself,' . . ." thereby substituting "its own rationale for that of the Commission." (J.S. 39).

While Appellants would have this Court believe that the District Court so limited its rationale, the fact is otherwise. Without equivocation, the District Court held:

> The findings clearly show these [statutory] terms to be descriptive of the organization and operation of the association here involved. The evidence in the record amply supports these findings. The Examiner and the Commission so concluded. We agree. (App. 5).

Such is tantamount to a holding that the decision of the Commission is supported by substantial evidence.

Illinois Central Railroad Co. v. *Norfolk & Western Railway Co.*, 385 U.S. 57, 66 (1966). That being the case, the District Court fully and properly discharged its review functions under Section 706 of the APA (5 U.S.C. § 706) and judicial inquiry is at an end. *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 620 (1966), *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474 (1951).

CONCLUSION

The District Court correctly held that the order of the Commission was supported by substantial evidence. Accordingly, Appellants seek to do no more than reargue issues of fact before this Court. Such issues do not merit further argument. Therefore, the decision of the District Court should be affirmed.

Respectfully submitted,

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No. 355

In the Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

ERWIN N. GRISWOLD,
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EDWIN M. ZIMMERMAN,
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In the Supreme Court of the United States

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No. 355

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 6a) dismissing a complaint challenging a decision and order of the Interstate Commerce Commission (J.S. App. 8a). On September 11, 1963, appellants, the National Motor Freight Traffic Association, Inc., and the Regular and

318-090—68

Irregular Route Conferences of the American Trucking Associations, Inc., filed with the Commission a complaint which, as amended, alleged that various defendants including Pacific Progress Shippers Association (Pacific), were engaged in operations as freight forwarders as defined in Section 402(a)(5), 49 U.S.C. 1002(a)(5), without the permit required by Section 410(a), 49 U.S.C. 1010(a). The complaint sought a Commission order requiring each defendant to cease and desist from the alleged violations of the Act. A hearing was held before a Commission examiner in March, April, and June, 1965. On December 29, 1965, the examiner issued his report, in which he found that Pacific was an association of shippers whose operations had been conducted in good faith pursuant to the clarifying provision of Section 402(c) of the Act; that none of the defendants were engaged in services as freight forwarders under Section 402(a)(5); that the members and the elected trustees of Pacific assumed the essential risks and burdens of the association and controlled, directed, and dominated its operations; and that the evidence adduced failed to establish the allegations of the complaint. Consequently, the examiner recommended dismissal of the complaint. Thereafter, exceptions were filed and on June 20, 1966, the Commission, by its Division 1, issued a decision and order affirming and adopting, with one exception not herein pertinent, the report and recommended order of the examiner (J.S. App. 8a–102a). The Commission observed that the evidence, when considered in light of the standards enunciated in *Atlanta Shippers Assn., Inc.—Investigation,*

322 I.C.C. 273, and *National Motor Freight* v. *New Hampshire Shippers Co-op.*, 323 I.C.C. 658, justified the result reached by the examiner. The Commission, therefore, dismissed the complaint (J.S. App. 8a–102a).

Appellants then filed their complaint in the district court seeking to annul and set aside the decision and order of the Commission. On December 6, 1967, the district court issued a *per curiam* opinion dismissing the complaint (J.S. App. 4a–5a). After quoting Section 402(c), 49 U.S.C. 1002(c), the court noted that the findings of the Commission revealed that the statutory language clearly applied to Pacific, and, without further consideration of Commission opinions interpreting the statute, dismissed the complaint.

ARGUMENT

Appellants' primary contention is that the Commission erroneously concluded that Pacific was a bona fide shippers' association pursuant to Section 402(c), 49 U.S.C. 1002(c), because there is an absence of joint and several liability on the part of the membership of Pacific. The Commission found, however, that the members and trustees of Pacific bore the essential risks and burdens of the association and, thus, the association came within the purview of Section 402(c). This holding is in accord with its prior decisions, that joint and several liability on the part of the members of a shippers' association is not a prerequisite to a finding of compliance with the provisions of Section 402(c). *Atlanta Shippers Assn., Inc.—Investigation,* 322 I.C.C. 273, 283–288. See, also, *Regula-*

tions for Payment of Rates and Charges, 326 I.C.C. 483, 495; *Natl. Motor Frt. Traf. Assn.* v. *Industrial Shippers Assn.,* 103 M.C.C. 545, 552–553.

The Commission's position, as articulated in these cases,[1] was approved in *Freight Forwarders Institute* v. *United States,* 263 F. Supp. 460, 465 (S.D.N.Y.), where the court said: "We agree with the Commission that it is sufficient that these risks [of operation] *not* be borne by any party other than the shipper association itself, whatever its limitations on individual member liability, as long as the members in good faith exercise responsible control over their association's operations."

The Commission's conclusion that the members and trustees of Pacific, and no other person, bore the essential risks and burdens of the association, is supported by adequate findings (J.S. App. 79a–90a) and based upon substantial evidence of record (J.S. App. 16a–70a; J.S. App. 94a–102a; Exh. A of Exh. 41, Exh. C of Exh. 46, Exh. 48, Exhs. A and C of Exh. 56).[2] Thus, the decision and order of the Commission was properly sustained by the district court. *Consolo* v. *Federal Maritime Commission,* 383 U.S.

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[1] The Commission's holding in *Atlanta Shippers,* is, of course, an application of this Court's decision in *United States* v. *Drum,* 368 U.S. 370. That case requires only that a shipper (in the present case, the association) bear the burdens of the operation. It says nothing of the question of individual liability of members of the association.

[2] In the court below appellants conceded that they did not challenge the correctness of the Commission's conclusion that the members and trustees of Pacific controlled, directed, and dominated its operations (Reply brief, pp. 1, 4–5).

607, 619–621; *Rochester Tel. Corp.* v. *United States,* 307 U.S. 125, 138–140.

Appellants also contend that the district court erred in finding it unnecessary to consider the rationale articulated by the Commission in *Atlanta Shippers Assn., Inc.—Investigation, supra,* which the Commission referred to here in reaching the conclusion that Pacific was a bona fide shippers' association exempt from regulation under the provisions of Section 402(c).[3] The district court concluded, however, that the amply-supported findings of the Commission showed that the organization and operation of Pacific were precisely within the language of Section 402(c), 49 U.S.C. 1002(c) (J.S. App. 5a). Since the district court based its determination on a reading of the statutory language, it is irrelevant that the Commission did not directly base its decision on the statute but instead applied its earlier decisions interpreting it. *Securities and Exchange Commission* v. *Chenery Corp.,* 318 U.S. 80, 88; *Milk Transport, Inc.* v. *I.C.C.,* 190 F. Supp. 350, 354–355 (D. Minn.), affirmed *per curiam,* 368 U.S. 5. See also *Lester C. Newton Trucking Company* v. *United States,* 264 F. Supp. 869, 876–877 (D. Del.), affirmed *per curiam,* 389 U.S. 30.

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[3] Contrary to appellants' contention (J.S. 39), the holding of the district court does not reject the Commission's rationale (J.S. App. 5a). Rather, the court found it unnecessary to discuss the Commission's reliance on *Atlanta Shippers.*

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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No. 355

Supreme Court of the United States

OCTOBER TERM 1968

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Appellants,

vs.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, et al., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16 (1) (c) and (d) of the Rules of this court, Pacific Progress Shippers Association, Inc, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a Three-Judge District Court (JS App. 4a-7a) dismissing appellants' suit to set aside an order (JS 8a-102a) of the Interstate Commerce Commission. The basic issue is the validity of the Commission's finding that

none of the defendants in the cause were shown to be engaged in service as a freight forwarder in violation of Sec. 410(a) of the Interstate Commerce Act as alleged in the complaint and that the complaint should be dismissed.

PACIFIC PROGRESS SHIPPERS ASSOCIATION, hereinafter referred to as "Pacific", was incorporated in 1961 as a non-profit corporation under the laws of the State of Washington for the purpose of procuring the "pooling, consolidation, transportation and distribution of freight..."(Record, Ex. 5).

Interstate Commerce Act, Sec. 402 (c) (1), 49 U.S.C. Sec. 1002 (c) (1) provides as follows:

> "The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, . . . "

This legislative pronouncement was lawfully enacted by Congress and Pacific was incorporated in 1961 with a view toward realizing the economic benefits to its corporate members specifically contemplated by the legislation. Pacific has continuously operated as an association of shippers under the above legislative provision.

Appellants are national organizations of common carriers by motor vehicles. As stated in their Jurisdictional Statement, p. 4, their functions and purpose of existence are to from time to time institute and participate in administrative and judicial proceedings concerning the lawfulness of the operating practices

of persons engaged in performing transportation or in rendering transporation services in competition with members of their organizations. Apparently in response to this purpose of their existence, they filed complaint with the Interstate Commerce Commission on September 11, 1963, alleging that Pacific and other named businesses and individuals were performing certain transporation services unlawfully in violation of designated sections of the Interstate Commerce Act and that Pacific was engaging in services as a freight forwarder without Commission authority. The complaint was the subject of extended hearings held before the Interstate Commerce Commission delving into all aspects of Pacific's operations. Thereafter, the hearing examiner filed an extended and lengthy report and recommended order in which he concluded that the operations and functions of Pacific were proper and lawful and recommended that the complaint be dismissed.

Feeling aggrieved by the conclusion reached, appellants noted their exceptions to the report and recommended order of the examiner. At a session of the Interstate Commerce Commission held on June 20, 1966, speaking through its Division One, the Commission dismissed the complaint and concurred in the disposition of the case by the examiner. (JS App. 8a-90a). The next step in the sequence of events leading to the submission of this court was an appeal to a Three-Judge United States District Court for the District of Columbia. After consideration of briefs by all affected parties and oral arguments, the Three-Judge District Court by per curiam opinion agreed with the Commission and concluded that the complaint should be dismissed. (JS App. 4a-5a). Now appellant seeks review by this court.

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this court.

By their jurisdictional statement, appellants solicit further judicial review by seeking to invoke the jurisdiction of this court to decide two questions. The first is the question regarding an alleged statutory qualification for sanctioned Interstate Commerce Commission exemption of a shipper association, such as Pacific, which is a corpporate legal entity and, secondly, the question of adequacy of findings and conclusions as required by the Administrative Procedure Act (5 U.S.C., Sec. 557), as well as the Three Judge District Court consideration of such procedural question under the terms of Sec. 706 of the Administrative Procedure Act, 5 U.S.C., Sec. 706.

Referring to the provisions of the Interstate Commerce Act cited above, Congress saw fit to exempt from regulation groups or associations of shippers consolidating or distributing freight for members of the associaation on a non-profit basis. Nowhere in the congressional enactment is found language providing that if such groups or associations of shippers are organized into non-profit corporations they are not qualified for exemption. All parties, in briefs before the Three-Judge District Court, engaged in detailed analyses of this question and gave extensive consideration to Commission pronouncements regarding such shipper groups. The entire matter was the subject of considerable argument. However, the court, after considering such arguments, pierced through the entire maze and reached the correct conclusion that the answer to the problem presented by the complaint is

more directly reached by direct consideration of the question of whether the evidence supported the conclusions that the operations of Pacific brought it within the terms of the statutory exemption. (JS App. 5a).

An analysis of the operations of Pacific in its function as an association of shippers which operations and functions are described in the voluminous record before the Commission, all as found by the examiner and set forth in his Statement of Facts, Conclusions and Findings (JS App. 16a-70a), dictate that Pacific is an organization envisioned by the congressional enactment of Sec. 402 (c) (1), 49 U.S.C., Sec. 1002 (c) (1) of the Interstate Commerce Act. Pacific operates no vehicles or other transportation equipment but rather utilizes the transporation provided by authorized and regulated carriers, both for the consolidation and distribution of commodities as well as for the actual transport of those commodities between points of consolidation and distribution for its members.

The record before the Commission and before the District Court as found in Jurdisdictional Statement App. 10a-90a details the organization of Pacific as an association, their designation of an agent to conduct their day to day operations, their periodic meetings to maintain direct supervision and control of the operations by the shippers, and their history of successful operations and utilization of authorized rail carriers as well as motor carriers for consolidation and distribution. Weighing Pacific's operations on the one hand and the exemption provisions of the Interstate Commerce Act on the other, the Commission concluded that Pacific falls within the definition of

an association of shippers consolidating or distributing freight for themselves or their members, on a non-profit basis, for the purpose of securing the benefits of carload, truckload or other volume rates.

The appellants have urged throughout that Pacific cannot qualify for exemption from regulation by the Commission because Pacific is an incorporated non-profit corporation. Appellants seek judicial aid in modifying the Congressional provision to suit their own preference and interest. This relief is solicited in the face of judicial determination by this court that the fact of incorporation is not determinative in passing upon the legality of the association operations. *Pacific Coast Wholesalers Ass'n v. U.S.*, 338 U.S. 689 (1950), affirming per curiam *Pacific Coast Wholesalers Ass'n v. U.S.*, 81 Fed. Supp. 991 (So. Dist. Cal. 1949).

Addressing ourselves to the second allegedly substantial question raised by appellants' Jurisdictional Statement (JS 37), it is submitted that the record is voluminous regarding the evidence, findings and conclusions of the Commission in reaching its decision. It has been judicially determined that the Commission need not make specific findings on all material issues of fact, law or discretion presented on the record. The criterion is if the appellate court and the parties to the proceeding are apprised of the basis of the agency's decision and order by looking to the total record, including the examiner's report and recommended order, the requirements of the Administrative Procedures Act respecting findings are met: *Key v. U.S.*, 263 Fed.Supp. 544 (So.Dist.Ind., 1966). Further, the courts have determined that the Commission is not required to make as detailed findings of fact

as required of a trial court. *Chicago & E.I.R. Co. v. U.S.,* 107 Fed. Supp. 118 (So. Dist. Ind., 1952). A review of the Decision and Order of the Commision (JS Auu. 8a-90a) in this case dictates the conclusion that the total record, including the examiner's report and recommended order, manifestly apprises the parties of the basis of the agency decision. The Commission's Decision and Order also abides the *Key* case, *supra,* in authorizing and endorsing Commission procedure in the adoption of reports and recommended orders of its examiners by short form pursuant to Attorney General's Manual on the Administrative Procedure Act (1947) at p. 86.

CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James T. Johnson, one of counsel for PACIFIC PROGRESS SHIPPERS ASSOCIATION, INC., appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that, on the 27 day of August, 1968, I served copies of the foregoing document on the parties hereto, postage prepaid, to the following:

On Honorable Edwin R. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, and John H. D. Wigger, Esq., Attorney, Department of Justice, Washington, D. C. 20530.

On Robert W. Ginnane, Esq., General Counsel, and Manny H. Smith, Attorney, Interstate Commerce Commission, Washington, D. C. 20423.

On Ronald N. Cobert, Esq., 600 Madison Building 1155 15th Street, N.W., Washington, D. C. 20005.

On Rea, Cross & Knebel, 917 Munsey Building, 1329 E Street, N.W., Washington, D. C. 20004.

JAMES T. JOHNSON

.....

James T. Johnson

No. 355

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

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No. 355

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

---

BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

In their motion to affirm the United States and the Commission state the Commission's finding and conclusion in this case to be that "the members and trustees of Pacific, and no other person, bore the essential risks and burdens of the Association," and that this holding is in accord with the Commission's prior decisions, notably *Atlanta Shippers Association, Inc.—Investigation,* 322 I.C.C. 273, 283-288 (1964). In the next breath they then state that the position the Commission has articulated in *Atlanta Shippers* is that "it is sufficient that these risks [of operation] *not* be borne by any party other than the shipper association itself, whatever its limitations on individual member liability . . . ."

By their motion Appellees have thus demonstrated the very reasons why this Court should entertain plenary review of this appeal. First, they make clear that, notwithstanding the district court's ruling that the issue of risk is answered by "the terms of the statute itself" rather than the "various interpretative pronouncements of the Commission," the Commission's order can be sustained, if at all, on the rationale of the *Atlanta Shippers* case. Second, they now confirm that the rationale of *Atlanta Shippers* gives rise to two diametrically opposed requirements of risk. Manifestly, if as the Commission here found, the shipper members, and no other persons, bear the essential risks of the association, it is neither sufficient nor logical that these risks "be borne" by the "association itself." Conversely, if shippers are free to create a freight forwarding corporation which assumes all risks and burdens of the transportation, it was irrelevant and immaterial for the Commission here to conclude, albeit with no supporting findings or evidence, that the members of Pacific bear these risks and burdens.[1] The ultimate issue before the Commission in this case was whether the financial risks of the exempt freight forwarding operation must be borne by the shipper members of the association, or whether shippers are free to shift this risk to the association itself. Appellees now candidly admit that the Commission's holding on this point is equivocal, and establishes an ambiguous standard which, on the one hand, purports to require risk to be on the members, while on the other leaves the members free to place the risk on the association.

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[1] Appellees assert that this holding is supported by adequate findings and based upon substantial evidence of record. However, they do not favor the Court with citations to concrete evidence or specific findings to this effect, choosing instead to make a general reference to 74 pages, or substantially all of the voluminous examiner's report in the proceeding (JS App. 16a-90a). A perusal of that report and the record underlying it discloses no findings and not a scintilla of evidence which would support this holding.

Appellees concede that the Commission's rule in *Atlanta Shippers* is intended to be an application of this Court's decision in *United States* v. *Drum*, 368 U.S. 370 (1962). They argue, however, that "that case requires only that a shipper (in the present case, the association) bear the burden of the operation" and "says nothing of the question of individual liability of members of the Association." (Motion to Affirm, p. 4, n. 1). True, *Drum* says nothing about the liability of a shippers' association member for the simple reason that that case did not deal with Section 402(c), but involved the private carriage exemption in Part II of the Act, 49 U.S.C. § 303(a)(17). Having recognized that the principle there decided is applicable in determining the status of a shippers' group claiming exemption under Section 402(c), Appellees test the credibility of the Court with their fallacious analogy between the shipper in *Drum* and the association here.

In *Drum* a shipper, claiming to be performing his own transportation as a private carrier, utilized the vehicles of unlicensed owner operators who bore the essential risks and burdens of the operation. This Court held that this arrangement was not private carriage by the shipper but for-hire carriage by the owner operator without proper authority. Here, the counterpart of the shipper in *Drum* is not the association, but its individual shipper members who, claiming to be performing their own transportation, collectively utilize the unlicensed services of the association which they have purposely created in corporate form to assume the essential risks and burdens of the transportation.

Appellees' attempt to equate the incorporated association to that of the shipper who must bear the risk of transportation is directly contrary to the holding in *Atlanta Shippers*.[2] There the Commission took care to point out

[2] The argument is also incompatible with *United States* v. *Pacific Coast Wholesalers' Association*, 338 U.S. 689 (1950) where this Court held that the association at all times acts as the agent of the shipper members who are the principals, and with *Regulations for*

that the physical characteristics of a regulated forwarder and an unregulated shippers' association "are identical for all practical purposes," in that both ordinarily assemble and consolidate or provide for the assembling and consolidation of shipments; both normally perform or provide for the performance of break-bulk and distributing operations with respect to such consolidated shipments; and both utilize, for at least part of the transportation, the services of a carrier or carriers subject to Parts I, II, or III of the Act. The only functional distinction between the two is that, whereas the regulated forwarder performs these services for the general public for compensation, the unregulated association performs them only for its members without compensation. 322 I.C.C. at 280. Just like a regulated forwarder, a shippers' association is a shipper *vis a vis* the Part I, II or III carriers it utilizes for the underlying transportation. And just like a forwarder, the association acts as a carrier *vis a vis* the shipper whose shipments it accepts for transportation. It is precisely this similarity between an unregulated association and a regulated forwarder which the Commission, in *Atlanta Shippers*, said necessitates a test of substance which will determine "whether the group or association (or the shipper-members through their organization) is purchasing transportation in which the essential risks and burdens" of the services are assumed for the association's members by a person not licensed by the Commission. 322 I.C.C. at 279.

Appellees claim the district court did not reject the Commission's rationale in this case, but "rather . . . found it unnecessary to discuss the Commission's reliance on *Atlanta Shippers*." (Motion, p. 5). This is a distinction without a difference. The specific reason given by the district court for ignoring the reasoning of the Commis-

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the Payment of Rates and Charges, 326 I.C.C. 483 (1966) cited by Appellees, where the Commission insisted that the shipper members are responsible as the beneficial owners of the goods moved, and can place no effective insulation between themselves and third persons.

sion was that "the answer to the problem is more easily reached by direct consideration of the terms of the statute itself." (J.S. App. 5a). Yet, the crux of the Commission's rationale here and in *Atlanta Shippers* was that the problem cannot be resolved by the terms of the statute. The Commission stated in *Atlanta Shippers*, 322 I.C.C. at 278:

> "Whether any particular transportation function is, in substance, a forwarding service, the unauthorized sale of which is prohibited by the statute, can be determined only after careful and complete analysis of all the facts and circumstances surrounding the performance of such transportation. And compliance with the act's regulatory requirements cannot be evaded by means of subtle arrangements or shades of form if the substance and basic nature of the operation bring it within the purview of the law. It is not enough, however, for us merely to examine the facts in a particular case and, applying an unelaborated test of substance, to declare whether a given operation is or is not service subject to part IV of the act. If the purposes of the law are to be accomplished, and if the regulation expected of us is to be practicable, it must be intelligible to those regulated. Stated differently, in a case like the present, *we must distill from the statute, criteria by which the public also can readily and accurately classify a particular activity.* We must go a step beyond the bare conclusion to declare those considerations which lead us to it, and thereby establish a guide for the future as well as a judgment on the past." (Emphasis supplied).

To attain this end, the Commission went on to say that it was essential for it to identify and examine the troublesome and doubtful situations "in distinguishing between regulated freight forwarder service and non-regulated *but physically similar* operations of nonprofit groups or associations of shippers." (*Id.*, emphasis supplied). It then articulated as the standard in making this determination a test which prohibits persons other than the shipper members to assume the essential risks and burdens of the

transportation. It is this rationale and this standard which the district court ignored and Appellees would now disavow.

Hence, it is not irrelevant, as Appellees contend, that the district court decided the case on the basis of the statute instead of the Commission's construction thereof. In *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80 (1943) on which Appellees rely, this Court held that a commission decision must be upheld, if at all, on the basis of the rationale on which the agency relies. The district court here not only ignored the Commission's reasoning, but affirmed the Commission's order by substituting its own rationale which is at direct odds with that of the Commission. Since, as Appellees now make clear, the Commission's holding in *Atlanta Shippers* is ambiguous and irrational, and, as Appellants have pointed out (J.S., p. 37), that decision has never been subject to judicial review, plenary review by this Court is imperative.

None of the three motions to affirm filed by the various Appellees mentions much less discusses the decision of the United States District Court for the Central District of California in *North American Car Corporation, et al.* v. *United States Rubber Company, et al.* (May 8, 1967, unreported, J.S. App. 103a, et seq.). Thus, as they did in the district court, Appellees continue to acquiesce in that decision holding that the shipper members of an incorporated association are liable for none of the financial obligations incurred by the association in performing transportation on their behalf. In no manner can this acquiescence be reconciled with the Commission's decision here that the members bear the risk of such obligations. Moreover, the transparent and *post hoc* rationalizations[3] of Appellees' counsel in attempting to reconcile the Commission's contradictory positions is now being pursued by the Commission itself. Appended hereto is the Commission's decision in Docket No. MC-C-

[3] *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156 (1962).

3192 (Sub-No. 7), *National Motor Freight Traffic Association, et al.* v. *Columbia Shippers Association, Inc., et al.*, 105 M.C.C. 846 (1967). There, as here, the Commission held to be bona fide and exempt under Section 402(c), an incorporated association organized so as to immunize its members from all risk and liabilities of the transportation. In arriving at this result, the Commission in three consecutive and relatively brief paragraphs stated the applicable test to be that the *shipper members* must bear the financial and other risks and burdens of the association; concluded, with no supporting findings, that the *members* of Columbia bear these risks; proceeded to the contrary conclusion that the essential risks and burdens, rather than being upon the members, are upon the wholly separate *incorporated entity of Columbia itself;* and finally held, directly contrary to the test it declared to be applicable, that the assumption of such risks by the *association* is sufficient. The Commission then caps this astounding confusion with the quotation from *Atlanta Shippers* to the effect that the shipper members of a nonregulated association are responsible as the beneficial owners of the freight and cannot insulate themselves from third persons. 105 M.C.C. at 851-852 (App. 18-21). Appellants have appealed this remarkable decision to the United States District Court for the District of Delaware where the case is now in the process of briefing. Civil Action No. 3553, *National Motor Freight Traffic Association, Inc., et al.* v. *United States, et al.*

The rationale of *Atlanta Shippers* as the Commission purported to apply it here and in *Columbia Shippers* is not intelligible to the regulated transportation industry, does not accomplish the purpose of the law, and cannot achieve the practicable regulation which the public, the transportation industry, the Congress and the courts expect of the Commission. In this respect, the dissenting opinion of Commissioner Walrath in *Atlanta Shippers* is both prophetic and a compelling statement of the reasons why plenary

review is required by this Court. Speaking for five members of the eleven-man Commission, he stated, 322 I.C.C. at 298:

> "Part IV of the act was promulgated to regulate the business of freight forwarders, but in regulating freight forwarders, the Congress concomitantly intended to "foster sound economic conditions in transportation and among the several carriers." Thus when confronted with a question of statutory interpretation, our role, as I see it, is to give effect to the design of Congress, particularly where the language of the statute is consistent with the objectives of the national transportation policy. Cf. *United States* v. *American Trucking Assns., Inc.*, 310 U.S. 534. To my mind, the result reached by the majority flies in the face of congressional intent, for instead of encouring a viable freight forwarder industry, the decision threatens its continued existence. Therefore, even had I doubts as to the validity of the conclusions in the prior report—and I have none—I would still feel that the public interest impelled the conclusion reached there. Then, if in a proper test of the corporate issue in the courts a contrary conclusion were reached, I would urge that the Commission promptly bring the matter to the attention of the Congress in the interest of final clarification; for I know of no effective method to curb the abuses of shipper association privileges under the majority's decision. A case-by-case handling of questionable corporate structures is simply unworkable."

CONCLUSION

For the foregoing reasons and those stated in their Jurisdictional Statement, Appellants urge the Court to deny the motions to affirm, note probable jurisdiction of this appeal, reverse the judgment of the district court, and remand the case to that court for disposition consistent with the Court's opinion.

Respectfully submitted,

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APPENDIX

Served October 27, 1967

M-11664

INTERSTATE COMMERCE COMMISSION

No. MC-C-3192 (SUB-NO. 7)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.

v.

COLUMBIA SHIPPERS ASSOCIATION, ET AL.

No. MC-C-3192 (SUB-No. 7)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., ET AL.

v.

COLUMBIA SHIPPERS ASSOCIATION, ET AL.

Decided October 12, 1967

Upon reconsideration, findings in prior decision and order dated November 2, 1965, reversed, defendants found to be providing or participating in certain freight forwarder operations, in interstate commerce, in violation of section 410(a) of the Interstate Commerce Act. Cease and desist order entered.

Eugene T. Liipfert and *Bryce Rea, Jr.*, for complainants.

Leonard A. Jaskiewicz, Joseph E. Keller, and *Ronald N. Cobert,* for defendants.

Giles Morrow and *James L. Givan* for intervener in support of complainants.

Joe G. Fender, Leonard Monzeon, Charles A. Washer, Leonard A. Jaskiewicz, and *Ronald N. Cobert,* for interveners in support of defendants.

REPORT OF THE COMMISSION ON RECONSIDERATION

MURPHY, *Commissioner:*

This proceeding, which involves consideration of the proper functions of an association of shippers under section 402(c) of the Interstate Commerce Act, was desig-

nated as being of general transportation importance by order of the Commission dated December 7, 1965. Subsequently, upon consideration of petitions for reconsideration filed by complainants and by the Freight Forwarders Institute, of the replies thereto, and for good cause shown the proceeding was reopened for reconsideration by order dated April 14, 1966.

By complaint filed February 24, 1961, complainants, National Motor Freight Traffic Association, Inc., Regular Common Carrier Conference of American Trucking Association, Inc., and the Common Carrier Conference-Irregular Route, allége that defendants, Columbia Shippers Association and Duane F. Barnes, an individual, both of Philadelphia, Pa., have been, are now, and will continue to be, engaged in certain practices in violation of sections 206(a), 209(a), and 410(a) of the Interstate Commerce Act and seek issuance of an order directing defendants to cease and desist from the alleged violations and granting such other and further relief as may be warranted. The Freight Forwarders Institute has been permitted to intervene in support of complainants and American Institute for Shippers Association, Inc., American Retail Federation, National Conference of Non-Profit Shipping Associations, Inc., and National Retail Merchants Association have also been permitted to intervene in this proceeding. All parties will be referred to by short titles.

In the prior decision and order, dated November 2, 1965, division 1 stated (1) that the examiner properly placed the burden of proof on the ecomeplainants, citing *National Motor Freight Traffic Association, et al* v. *United States, et al.*, 242 F. Supp. 601 (1965), (2) that the record supports a finding that complainants failed to adduce sufficient evidence upon which the Commission could properly reach a conclusion that defendants were engaged in any unlawful coloading practices or were conducting operations as a forwarder within the meaning of section 402(a)(5) of the act, and (3) that the com-

plaint should be dismissed. The principal issues raised on petition are whether the association defendant bears the essential risks and burdens as required by the criteria set forth in *Atlanta Shippers Assn., Inc.—Investigation*, 322 I.C.C. 273; whether the burden of proof was properly placed, and whether the association properly may coload with nonmembers.

FACTUAL BACKGROUND

The essential facts are not disputed. Columbia Shippers Association is a nonprofit association of about 38 shipper-members who do business in the Philadelphia commercial zone. Over 95 percent of the volume of traffic handled by the association consists of truckload shipments moving in plan III "piggyback" service whereby the railroad furnishes only a transportation service between its trailer-on-flatcar ramps. The pertinent rail tariff provisions offer all-freight rates for single shipments moving in two-trailer lots on an allowed volume of 70,000 pounds providing that not more than 60 percent of the consignment consists of a single commodity. Thus, the association form of operation allows individual shipper-members the opportunity to match loads with other members and obtain volume rates whereas separately they might have an inadequate volume of freight or a lack of commodity variety to satisfy the mixing provision.

Defendant Barnes performs most functions for the association as its general agent and he is compensated on a per-trailer basis. Charges to shipper members are otherwise based upon the actual cost of the freight charges and services, including trailer rental and cartage fees. Barnes is also the controlling stockholder of Shippers Traffic Service, Inc. (The other stockholders consist of Barnes' wife and his attorney.) This corporation, which was organized in May of 1962, approximately a year after the instant complaint was filed, purportedly acts as a freight consolidator and shippers' agent at Philadelphia.

It uses the same office facilities and personnel that Barnes uses in his capacity as general agent of the defendant association. Shippers Traffic Service, Inc., performs a so-called "consolidation service" for the association when the latter has only one trailer to ship and it provides a matching trailer for movement to the same destination. These trailers are obtained from five individual shippers, Standard Pressed Steel, Sun Oil Company, Food Fair, Tung Sol Electric, and Dennis Mitchell Industries, none of whom are members of Columbia Shippers Association. Matching trailers are also obtained from several other actual or purported shippers' associations namely: Detroit Shippers Association, Associated Shippers, United Shippers Association, Piggy-Back Shippers Association of Florida, and an unnamed association operating eastbound from St. Louis. One member of the association, Blue Bird Products, is the only member shipping meats and meat products. It coloads at St. Louis with this unidentified association on movements to Philadelphia but has never combined traffic with another member of the defendant association. Columbia Shippers Association also participated in coloading with Delaware Valley Freight Terminal, another purported consolidator or shippers' agent. In most cases the coloaded shipments are in separate trailers on the same flatcar but in a few instances association traffic is coloaded in the same trailer with the freight of nonmembers. Shippers Traffic Service, Inc., in its role as "agent" is named on the rail billing as the consignor but not as consignee. Barnes testified that two consignees, usually local cartage companies, may be named. At the request of the association Barnes prepared a list of cartage agents at various points which the association ships to and he also negotiated certain oral or written arrangements as to rates and service. Of the points the association principally ships to, both Atlanta. Ga.. and Dallas, Tex., have only one cartage agent listed while Chicago, Ill., Detroit, Mich., and St. Louis, Mo., each list two or more. The specific cartage agent

is selected by either the shippers or the associations and Shippers Traffic Service, Inc., as agent, purportedly is not involved directly in any break-bulk, or distribution services outside of the Philadelphia commercial zone. On the few occasions where the association has commingled less-than-truckload shipments in the same trailer with similar shipments supplied by Shippers Traffic Service, Inc., they have been billed in the latter's name. When movements are solely for Columbia Shippers Association, Barnes prepares the billing in the association's name in his role as general agent. Otherwise, Barnes prepares the billing naming Shippers Traffic Service, Inc., as the consignor in his alternative role as shippers' agent. Shippers Traffic Service, Inc., receives a fee based upon the number of trailers handled. Barnes, as shippers' agent has discussed the possibility of acting as representative for other shippers' associations and, in his efforts to obtain business for Shippers Traffic Service, Inc., he uses a calling card with his name, the name of Shippers Traffic Service, Inc., and the address of both the latter and Columbia Shippers Association.

DISCUSSION AND CONCLUSIONS

The basic issue in this proceeding is whether the defendant association is operating as a bona fide shippers' association within the provisions of section 402(c) of the act or whether defendants are circumventing the regulatory scheme and conducting operations subject to the licensing requirements of section 410(a) of the act [1] without appropriate authority therefor. Section 402(c) provides that:

> The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or dis-

[1] Section 410(a) provides that no person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service.

> tributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed.

On the other hand section 402(a)(5) of the act provides as follows:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this act) holds itself out to the general public as a common carrier to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this act.

I

Burden of Proof.—The recent series of proceedings involving the operations of shippers' associations has generated a certain amount of confusion regarding the question of burden of proof. In cases of this nature, we believe that a complainant has met its initial burden of proof when it has made a showing that defendants are performing operations which appear to be those subject to the involved regulation per the criteria of the *Atlanta*

Shippers case. For example, evidence showing that an association is holding out to serve the general public or profitmaking, that someone other than the membership of the association exercises direction and control over the association, or that the membership has failed to assume the necessary risks and burdens would require an association to come forward with rebuttal evidence. Defendants or respondents, as the case may be, then must negate the factual showing of the complainant. In short, we believe that the ultimate risk of nonpersuasion remains upon the complainant throughout the proceeding, regardless of whether it is the Commission or a private party. The burden of producing evidence, however, will shift from the complainant to the defendant once complainant has established a prima facie case.

On the record developed herein, we conclude that complainants have met their initial burden of proof and that the record provides an adequate basis upon which a decision can be predicated both as to an evaluation of the facts concerning the defendants' operations and any questions of law involving the proper statutory interpretation of section 402(c) of the act.

II

Association Risk and Burdens.—The pertinent criteria applicable to shippers' association cases such as this have been discussed extensively in the *Atlanta Shippers* case, *supra*, at pages 283, 285, and 288 and will not be restated here in detail. The basic test is whether the freight consolidating and distributing operations in question are such that any person or persons other than the shipper-members of the association (a) have any right or ability to control, direct, or dominate such operations, or (b) bear the essential risk and burdens, financial and otherwise, of conducting the operations. Here, we agree with the examiner that the shipper-members of Columbia Shippers Association are shown to control and bear the

responsibility of the association's operations and we adopt his statement of facts and conclusions in this regard.

Briefly, the record demonstrates that the idea and formation of the association was shipper motivated, that only shippers are members and that these shippers have exercised effective control over the association and the person who operates as their general agent, and have assumed the risks and burdens incident to the operation of the association. Although the general agent, Barnes, must deduct most administrative costs from his compensation, an account for certain expenses such as insurance is maintained by the association. Also, the membership has provided the capitalization for the association and the charges of the association are usually based on actual costs. Further, it appears that the directors of the association maintain control over new memberships, the selection of cartage agents, and the finances of the association except insofar as the day-to-day functions are delegated to the general agent. For example, while the record of receipts and expenses are kept by the general agent, those items are the subject of a monthly audit by the membership, and the bank account of the association is controlled by the secretary-treasurer. Accordingly, we are persuaded that the essential responsibilities, risks, and burdens are not upon the general agent but rather upon the association and we conclude that the defendant association is a bona fide shippers' association within the meaning of section 402(c)(1) of the act. Compare *National Motor Freight* v. *New Hampshire Shippers Co-Op.*, 323 I.C.C. 658.

It is true that complainants attack as meaningless the risks and burdens rationale of the *Atlanta Shippers* case particularly since the entire Commission in that case rejected the requirement of division 1 that members of an association be jointly and severally liable for the activities of the association. However, a similar argument was dealt with by the court in *Freight Forwarders Institute* v. *United States*, 263 F. Supp 460 (1967). As

noted in that case, it is sufficient that the major risk of financial loss *not* be borne by any party other than the shippers' association itself, whatever the limitations on individual members liability, as long as the members in good faith exercise responsible control over their association's operations. Also, as noted by the court at page 465 (referring first to our decision in *Atlanta Shippers*) "shippers who are members of a nonregulated association are responsible as the beneficial owners of the goods moved and cannot insulate themselves in that respect from third persons" and further that "this safeguard has been recently strengthened by requiring shipper associations to advise carriers which member is the beneficial owner of freight listed on the bill of lading. *Regulations for Payment of Rates and Charges*, 326 I.C.C. 483, 494-95 (1966)."

Complainants also contend that the examiner considered only the control portion of the dual tests of the *Atlanta Shippers* case. The examiner, however, quoted both the control and essential risks and burdens tests of the *Atlanta Shippers* case and applied both of those standards. It is true that the examiner tendered to merge his discussion of the "risks and burdens" with his discussion of "control" but this appears to be more a matter of style than of substance, particularly since the facts concerning "risks and burdens" and "control" are not entirely separable.

III

Coloading with nonmember traffic.—Although we believe that the defendant association meets the basic statutory requirements and that it is a bona fide shippers' association under section 402(c) of the act, it does not necessarily follow that all operations of the type here under consideration are exempt from regulation merely because a bona fide shippers' association is involved. We refer specifically to the activities of the association in coloading interstate traffic destined to points beyond a

single-terminal area (1) with traffic of other shippers' associations and with (2) the traffic of individual, for profit shippers and in particular to the activities of general agent Barnes insofar as he participates in the performance of these services.

As noted above, section 402(c) provides that certain operations "* * * of a shipper or a group or association of shippers, in consolidating or distributing freight for themselves or the members thereof * * *" are not subject to the provisions of part IV of the act. We believe that this provision requires that an association's transportation activities must be confined to service for association members as shippers or consignees.[2] This is in line with *Atlanta Shippers* case at page 382 where the following observation was made:

> A shipper organization, however, may not justify service to any nonmember simply on the ground that the profits it may receive from such service ultimately or indirectly benefit the organization's members by helping defray the cost of handling their own shipments. On the contrary, a group or association of shippers, in order to avoid regulation under the Freight Forwarder Act, must affirmatively stand aloof to the lure of a public calling and may not lawfully handle shipments unconnected with, and fundamentally unrelated to, the nontransportation functions of its member shippers. To conclude otherwise in this respect would be to allow shippers' group or association to engage indiscriminately and without limitation in the for-hire freight forwarding business and would be inconsistent with the clear legislative mandate outlawing the purchase and sale of unlicensed forwarding services generally. According-

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[2] Service by an association in connection with shipments from nonmembers-consignors to member-consignees is considered membership service. *Pacific Coast Wholesalers, Assn.*, v. *United States*, 81 F. Supp. 991, affirmed *per curiam*, *United States* v. *Pacific Coast Wholesalers' Assn.*, 338 U.S. 689 (1950).

> ly, and after careful reconsideration of this aspect of the total subject, we are convinced that whenever a shippers' organization handles in its service shipments owned by nonmembers, such shipments must be functionally related to an activity (other than transportation) of an association member. Otherwise, it is clear that such service is supplied by the association with a purpose to profit from transportation as such, as distinguished from a purpose merely to obtain for its members the savings of carload, truckload, or other volume rates; that the association is, in effect, a seller of freight forwarding service; and that the operation is, in substance, a common carrier freight forwarding service provided by the association for compensation.

Under these circumstances, we believe that a shipper's association cannot coload with nonmember, for-profit shippers; however, we are persuaded that a different conclusion should be reached when the subject coloading is between two bona fide shippers' association.

The legislative history establishes that in passing the Freight Forwarder Act in 1942, Congress was not concerned as such with the activities of nonprofit shippers' associations but, rather, with seeking to remedy certain abuses and discriminations which had been fostered by the lack of regulation of for-profit forwarders.[3]

Congressman Oscar Youngdahl, a member of the sponsoring Committee on Interstate and Foreign Commerce, specifically stated during House debate (87 Cong. Rec. 8223) that:

> * * * many forwarders and others were quite ready to have us deny to shippers the opportunity which such shippers had long enjoyed—that is, to consolidate their less-than-carload shipments into pooled cars. In this connection I might mention the provision of

[3] See Congressman Wolverton's statement during House consideration of conference report on S. 210, the bill which was enacted into law, 88 Cong. Rec. 4065.

> the bill which exempts from regulation forwarding operations confined to the handling of a single-general commodity. The fact is that for many years there have existed forwarding operations confined to the handling of a single-general commodity which were in essence and effect a cooperative operation, although sometimes conducted through an independent organization on a profit basis. *The bill undertakes to exempt operations which are cooperative in form and your committee also concluded that equivalent operations even though not strictly cooperative in form should likewise be exempted. Such organizations have been of longstanding and have not in general created the present situation which requires remedial legislation.* * * * [Emphasis supplied.]

Although the "single-general commodity" provision was deleted in conference and did not become part of the enacted measure, as did the provision for nonprofit shippers associations, it is quite clear from the content and context of the quoted passage and the reference to "operations which are cooperative in form" that Congressman Youngdahl's last sentence referred also to *nonprofit* cooperative operations.

Additionally, the Supreme Court's decision in *United States* v. *Pacific Coast Wholesalers Association, supra,* supports the conclusion (1) that two nonprofit shippers' associations may lawfully coload, and (2) that a nonprofit shippers' association may not coload with nonmember for-profit shippers. In the underlying Commission proceeding, reported at 264 I.C.C. 134 and 269 I.C.C. 504,[4] Pacific Coast Wholesalers Association was found not entitled to unregulated status under section 402(c)(1) upon the basis that the association handled shipments moving from nonmember-consignors to member-consignees on delivered-

[4] Although not discussed in the report and not at issue, the statement of facts in that case indicates that a similar association was permitted to ship its freight in cars consigned to Pacific Coast. See 264 I.C.C. at page 138.

price terms. In reversing that finding, the United States District Court for the Southern District of California held (81 F. Supp. 991, 995-96):

> Here the determinative inquiry is not as to agency as between consignor-seller and consignee-member * * *, but as to the agency relationship between both or either of them and the association. And the facts found by the Commission admit of but one conclusion as to this: That the association at all times acts solely at the request, and under the direction, and for the account and benefit, of the member-purchaser. As between member and association, then, the former always acts as principal, the latter as agent.
>
> * * * * *
>
> Morover, both the purpose and the result of the transaction is not to benefit the (nonmember) shipper, but to reduce transportation costs to the member through savings effected in cooperation with other members who likewise employ the association as transportation agent.
>
> When this principal-agent relationship between member-purchaser and the association is borne in mind it is clear that there is no profit to the association from the activities described in the Commission's report * * *; and it is equally clear that the association, as agent for the members, does not "hold itself out to the general public * * * to provide transportation of property * * * for compensation" 49 U.S.C.A. § 1002(a)(5).

The Supreme Court affirmed the holding of the district court in a *per curiam* opinion, stating (338 U.S. 689, at page 691):

> * * * The court considered as decisive that no shipments by the association were ever undertaken except at the behest and for the benefit of a member. Looking to the agency between member and association, rather than that between buyer and seller, the court saw no reasonable ground for ruling that the

association was on a profit basis, or that it was holding its service out to the general public. We agree. There is nothing in the language of the act or the legislative history to suggest that Congress intended the exemption to turn on the type of shipment which was involved, whether f.o.b. origin or f.o.b destination (delivered price). On the contrary, it is clear that the nature of the relationship between the members and the group was thought to be determinative. Under that test, the valid claim of the association to the statutory exemption is established by the original Commission decision.

Based upon the foregoing, we believe there is a distinction between the two separate coloading practices engaged in by defendants. When the defendant association allows its agent to combine its traffic with that of an individual, for-profit shipper it is holding itself out to the general public and is, in effect, a seller of freight forwarding service and the operation is in substance a common carrier freight forwarding service provided by the association for compensation contrary to the requirements of the *Atlanta Shippers* case, *supra*, at page 282. On the other hand, when the defendant association coloads with another shippers' association, both are engaged in the furtherance of their nonprofit activities pursuant to the statutory objective of section 402(c).

Stated differently, since section 402(c)(1) specifically allows shippers to form an association on a nonprofit basis, in order to secure the benefits of volume rates, we believe that coloading by two bona fide shippers' associations, neither of which holds out its services to the general public, is consistent with the statutory objective. As noted in the *Atlanta Shippers* case at page 277:

> * * * the Freight Forwarder Act clearly safeguards the right of all shippers to combine their goods, on a nonprofit basis, for the purpose of obtaining the transportation savings flowing from their collective ability to utilize volume rates. * * *

There is nothing in the act or its legislative history to suggest that Congress intended to limit the exemption of section 402(c)(i) to internal coloading by members of a single nonprofit organization of shippers. Indeed, the absence of such a limitation is not inconsistent with section 1 of the Rules of Construction for Acts of Congress, 1 U.S.C. § 1. See also *Barr* v. *United States*, 324 U.S. 83 at page 91 (1945). Accordingly, we conclude that there is no specific bar to the practice of coloading by separate shippers' associations as long as the coloading benefits only the members of each shippers' associations and there is no holding out of service to the general public.

In reaching the foregoing conclusions, we are not unmindful of the argument of the complainants that while section 404(d) of the act specifically authorizes regulated forwarders to enter into agreements for the "joint loading" of traffic, there is no parallel provision applicable to shippers' associations. Section 404(d) allows a freight forwarder to use the employees and facilities of another freight forwarder and to engage in other mutual practices under certain conditions. See *Twin City Shippers Assn. Freight Forwarder Application*, 260 I.C.C. 307. However, the provisions of section 404(d) apply only to regulated forwarders and neither enlarge nor diminish the lawful scope of the operations of persons not subject to regulation. Compare *Kingpak, Inc., Investigation of Operations*, 103 M.C.C. 318, wherein it was found that the operations of exempt freight forwarders of used household goods are unaffected by the provisions of section 404(d). Accordingly coloading, as practiced by shipper associations, must stand or fall according to the substantive provisions of stction 402(c) of the act and is unaffected by the provisions of section 404(d) which apply only to regulated for-hire freight forwarders.

We also are unable to agree with the argument that decisions such as *Enterprise Trucking Corp. Contract Carrier Application*, 27 M.C.C. 264, *Irwin, Lyons-Exemption*,

Section 302(E), 265 I.C.C. 779, and *Schenley Distilleries Motor Division, Inc., Contr. Car. Ap.*, 44 M.C.C. 171, affirmed 61 F. Supp. 981 and 326 U.S. 432, dealing with for-hire motor and water carriers under parts II and III of the act are controlling of the instant case. As noted above, section 402(c)(1) provides that shippers may combine * * * for the purpose of securing the benefit of carload, truckload, or other volume rates * * *." No provision comparable to section 402(c) is contained elsewhere in the act and as a result the determination of the practices that shippers associations may properly engage in must be made solely within the four corners of the statutory provisions specifically applicable to such associations. Compare *Shipper Cooperative, Inc.* v. *Interstate Commerce Commission*, 308 F. 2d 888 (1962), which like the three cases cited immediately above, deals with operations subject to other parts of the act as opposed to activities governed by part IV. See also the *Atlanta Shippers* case at page 277.

As an addendum to our conclusion that coloading among shippers' association is lawful, we wish to make it clear that the substantive requirements of the *Atlanta Shippers* case, that the transportation activities of an association be under the direction and control of its shipper-members and that they bear the responsibility for such activities, cannot be avoided by resort to technicalities or paper arrangements. Just as coloading between shippers' associations cannot be condemned per se, neither can coloading between shippers' associations be sanctioned where the membership of any of the participating associations has defaulted on its overall obligation to maintain direction and control over or to assume the risks and burdens of the activities performed for its benefit.

In addition to coloading between shippers' associations, defendants use an agent, Shippers Traffic Service, Inc., to consolidate the trailers of independent, for-profit shippers along with the trailers of the defendant association at

Philadelphia and make available a service which contemplates the movement of the consolidated shipment to select destination points at cost plus a per-trailer compensation for the service. Defendants, thus, obtain new business from nonassociation shippers who might have a matching load to coload with the defendant association's traffic and, in effect, hold out service to the general public within the meaning of section 402(a)(5) of the act. As was said in the *Atlanta Shippers* case at page 282:

> A shippers' organization, however, may not justify service to any nonmember simply on the grounds that the profits it may receive from such service ultimately or indirectly benefit the organization's members by helping to defray the costs of handling their own shipments. On the contrary, a group or association of shippers, in order to avoid regulation under the Freight Forwarder Act, must affirmatively stand aloof from the lure of a public calling and may not lawfuly handle shipments unconnected with, and fundamentally unrelated to ,the nontransportation functions of its member-shippers. To conclude otherwise in this respect would be to allow shippers' groups or associations to engage indiscriminately and without limitation in the for-hire freight forwarding business and would be inconsistent with the clear legislative mandate outlawing the purchase and sale of unlicensed forwarding services generally.

Accordingly, we conclude that defendants' functions on behalf of individual, nonassociation shippers in providing for the movement of coloaded traffic bear all the essential attributes of regulated freight forwarding.

The defendant association contends that the consolidation service in question is legally performed by its agent, Shippers Traffic Service, Inc. However, we find that the consolidation service performed by Shippers Traffic Service, Inc., is under the effective control of the defendant association and that the defendant association cannot avoid responsibility in connection with the coloading of

member traffic with for-profit shippers through the use of a shippers' agent which, in fact, is the corporate alter ego of its own general agent. As previously noted, Barnes is the creator and owner of Shippers Traffic Service, Inc., which uses the same facilities and personnel as Barnes uses in his capacity as general agent of the defendant association and of course Barnes in his capacity as general agent is subject to the direction and control of the defendant association. We conclude, therefore, that the operations of a shippers' association and a shipper's agent cannot be combined so as to enable defendants jointly to provide essentially a complete freight forwarding service without appropriate authority. Compare *Southern Bonded Warehouse Co.—Investigation*, 318 I.C.C. 345 and *Natl. Motor Frt. Traf. Assn., Inc.* v. *Vendors Consolidating*, 326 I.C.C. 262. Barnes, in his multiple and conflicting roles, cannot do for the association what the association cannot do for itself and, the association, through its direction and control of Barnes, may not use Shippers Traffic Service, Inc., as an instrument to expand the scope of the association's activities to embrace those which are not otherwise permissible for a bona fide association operating under the exclusion of section 402(c) of the act.

The operations of Columbia Shippers Association in conjunction with Delaware Valley Freight Terminal, a freight consolidator, are not described with particularity on this record, but see *Natl. Motor Freight Traffic Assn.* v. *Delaware Valley*, 323 I.C.C. 560, affirmed in *National Motor Freight Traffic Assn.* v. *United States*, 242 F. Supp. 601 (1965), wherein the operations conducted by Delaware Valley were found not to be in violation of the act. The latter is employed by the former for the purpose of consolidating the traffic of members of the defendant association with the traffic of other persons. However, whether any of the operations performed by Delaware Valley for the defendant association are conducted in more than a single-terminal area is not shown on this record, nor does it appear whether the coloading that

occurs is limited solely to shippers associations. We are thus unable to make any specific adjudication herein relative to the defendant associations operations in connection with Delaware Valley. Compare the *Vendors* case, *supra*, at pages 272-73.

In summation, we conclude that the activities of an association of shippers excluded from regulation by section 402(c) of the act are limited to those activities conducted for shippers' association members, including the practice whereby one shippers' association coloads traffic with another "bona fide" shippers' association. Contrarywise, the practice by a shippers' association of coloading interstate traffic destined beyond a terminal area with the traffic of independent, nonmember shippers is a freight forwarding service which a shippers' association cannot perform for an individual shipper entity without violating the provisions of section 402(c) of the act.

Although Shippers Traffic Service, Inc., is not a party to this proceeding, it is operated by defendant Barnes. Said defendant will be required to personally cease and desist from the conduct of or participation in operations of the character found to be unlawful herein, and Shippers Traffic Service, Inc., shall be put on notice by this order to defendant Barnes that such operations may not be conducted. Thus, it is accordingly admonished to cease and desist from the performance of all operations of the character found to be unlawful.

Although our findings herein concerning the practice of coloading are intended to provide guidance in other proceedings, including those where jurisdiction has been retained on the question of coloading, it must be recognized that factual variations may require results different from that reached here. In those cases where jurisdiction has been specifically retained, the parties therein may file petitions requesting reopening and reconsideration of the coloading issue as applied to the pertinent records.

FINDINGS

On reconsideration, we find that defendants Columbia Shippers Association and Duane F. Barnes have been participating in or providing for the transportation of property, in interstate commerce, for compensation in the manner described in this report, without appropriate authority from this Commission; that certain operations, as described in this report, are subject to the licensing provisions of section 410(a) of the Interstate Commerce Act; that such operations are not within those functions of associations of shippers that are excluded from the provisions of part IV of the act as set forth in section 402(c) of the act; that an order should be entered requiring defendants to cease and desist forthwith and thereafter to refrain and abstain from the performance of, or participation in, any unauthorized operations in interstate commerce, of the character found in this report to be unlawful, unless and until appropriate authority is obtained from this Commission; and that in all other respects the complaint should be dismissed.

An appropriate order will be entered.

COMMISSIONER STAFFORD, dissenting in part:

I do not agree with the majority's treatment of the coloading issue. In my opinion, it does not matter with what kind of shipper or shipper group an association chooses to coload. The decisive question is whether the association, or the shipper with whom it coloads, receives from the other all the services of a forwarder. We may not conclude that an association acts as a forwarder merely because it cooperates with other shippers in informal groups to achieve the benefits of volume rates. There is more to forwarding than mere coloading.

There is ample authority for the conclusion that such informal shipper groups, if they do not offer complete for-

warding services to the general public, may not be treated as unlicensed forwarders. Part IV of the Interstate Commerce Act states this principle twice: once in sections 402 (a) (5) and (7) when it defines the services subject to regulations as those which usually entail holding out to the general public, consolidation, break-bulk, use of regulated line-haul carriers, and forwarder responsibility for the goods over the entire journey; and once again when it provides in section 402(c) that the provisions of part IV do not apply to nonprofit consolidation by groups or association of shippers.

The majority's device of calling shippers "for-profit shippers" cannot replace any of these statutory provisions, although it owes its superficial appearance of authoritativeness to one of them. The majority has mistakenly read section 402(c) as if its benefits were available only to shippers who do not engage in profit-seeking businesses, when, quite obviously, it is the transportation, not the shippers' primary businesses, which must not be conducted for a profit.

COMMISSIONERS SYPHERS and HARDIN did not participate.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its offices in Washington, D. C., on the 12th day of October 1967.

No. MC-C-3192 (Sub-No. 7)

NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC.,

v.

COLUMBIA SHIPPERS ASSOCIATION, ET AL.

It appearing, That on November 2, 1965, the Commission, division 1 entered its decision and order in the above-entitled proceeding dismissing the complaint;

It further appearing, That by order of December 7, 1965, the proceeding was designated as being of general transportation importance and that by order of April 14, 1966, upon consideration of petitions for reconsideration filed by complainants and intervener in support thereof, of the replies thereto, and for good cause shown, the above-entitled proceeding was reopened for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved has been given, and that the Commission, on the date hereof, has made and filed its report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the decision and order of November 2, 1965, are hereby referred to and made a part hereof:

It is ordered, That the said order of November 2, 1965, be, and it is hereby, vacated and set aside.

It is further ordered, That defendants Columbia Shippers Association and Duane F. Barnes be and they are hereby notified and required to cease and desist, and thereafter to refrain and abstain, jointly and severally, from

the performance of, or participation in, operations found in said report to be unlawful and in violation of the Interstate Commerce Act, unless and until appropriate authority therefor is obtained and that said defendants are also admonished to comply with the provisions of rule 1.99 of the Commission's General Rules of Practice.

It is further ordered, That the complaint in all other respects be, and it is hereby, dismissed.

And it is further ordered, That the statutory effective and compliance date of this order be, and it is hereby, fixed as December 11, 1967.

H. NEIL GARSON,
Secretary.

[SEAL]

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

NATIONAL MOTOR FREIGHT TRAFFIC ASSN., INC. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

No. 355. Decided October 14, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.